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SYMPOSIUM

THE FOURTH AMENDMENT RIGHTS OF CHILDREN AND JUVENILES

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FOREWORD

2010 FOURTH AMENDMENT SYMPOSIUM

THE FOURTH AMENDMENT RIGHTS OF CHILDREN AND JUVENILES

Thomas K. Clancy[*]

The National Center for Justice and the Rule of Law,[1] which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

A central pillar of the Fourth Amendment Initiative is its annual symposium on important search and seizure topics.

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[*] Director, National Center for Justice and the Rule of Law, and Research Professor, University of Mississippi School of Law.

[1] The National Center for Justice and the Rule of Law is supported by a grant from the Bureau of Justice Assistance, Office of Justice Programs, of the U.S. Department of Justice. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles stemming from this symposium are those of the author and do not represent the official position of the United States Department of Justice. For more information about the Center, please visit www.ncjrl.org.

Two-thousand-and-ten was the twenty-fifth anniversary of *New Jersey v. T.L.O.*,[2] which broadly set out the framework for evaluating searches of students by school authorities. In *Safford School District #1 v. Redding*,[3] the Court revisited this issue in the context of a strip search of a student by school authorities looking for nonprescription drugs. Beyond the school setting, there are many unique aspects of the application of the Fourth Amendment to juveniles and younger children. The authors in this volume of the *Mississippi Law Journal* offer an extensive treatment of the subject.

The symposium was held on the second day of an appellate judge conference. In the audience were approximately fifty appellate judges from across the country, as well as academics, members of the law school community, and others. It was webcast and the presentations may be viewed at www.ncjrl.org. I thank the authors for contributing to the symposium and to furthering our knowledge of Fourth Amendment jurisprudence.

Samuel Marion Davis, then Dean and now Professor at the University of Mississippi School of Law, was the keynote speaker at the symposium and contributes an article entitled *School Searches Writ Large: Broadening the Perspective in Which We View School Searches*.[4] He challenges us to view Supreme Court decisions involving juveniles in the larger context of the high court's jurisprudence, including Sixth Amendment jury trial cases, First Amendment decisions, and general Fourth Amendment jurisprudence. Viewed from that perspective, Professor Davis explains how the school search cases fit into the overall constitutional jurisprudence of the Supreme Court.

Professor Edwin J. Butterfoss of Hamline University School of Law brings his in-depth perspectives on the Fourth Amendment to the article entitled *School Children and Parolees: Not so Special Anymore*.[5] He addresses the quarter-century old "special needs" doctrine as the measure of "reasonableness," which has had significant importance for school searches. He examines the origins and development of the doctrine and concludes that the doctrine may have been eliminated entirely from the Court's suspicionless search jurisprudence in favor a "general Fourth Amendment approach."[6] Professor Butterfoss addresses the implications of those trends in the school search setting and more broadly to society at large. He concludes that the special needs doctrine, flawed though it may be, offers more constraint on government actions than the Court's more recent approach to reasonableness.

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[2] 469 U.S. 325 (1985).

[3] 129 S. Ct. 2633 (2009).

[4] Samuel Marion Davis, *School Searches Writ Large: Broadening the Perspective in Which We View School Searches*, 80 MISS. L.J. 789 (2011).

[5] Edwin J. Butterfoss, *School Children and Parolees: Not So Special Anymore*, 80 MISS. L.J. 805 (2011).

Professor Barry C. Feld, from the University of Minnesota Law, writes T.L.O. *and* Redding*'s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies.*[7] He reminds the reader of the many challenges present in schools, including drug use and violence, and examines how the Supreme Court, lower courts, legislatures, and schools have addressed—or avoided addressing—those challenges. He deconstructs and criticizes the Court's opinion in *T.L.O.* for departing from traditional Fourth Amendment reasonableness analysis, "instead adopting a formless reasonableness standard that provides minimal guidance."[8] *Redding*, in his view, is no better when it "announced a fact-specific limited right without any practical remedy."[9]

Professor Feld demonstrates the consequences of that lack of guidance in the responses of courts, legislatures, and school districts, to the various issues that arise in the school context. He catalogues a wide range of issues, including: the role of the exclusionary rule in juvenile and disciplinary proceedings; school searches conducted in conjunction with law enforcement; and intrusions by school resource officers, metal detectors, and canines; drug testing of students; searches of lockers, desks, and vehicles; and strip searches. He also addresses impediments to remedies when rights have been violated. He concludes that the Court erred in creating "a school search exception . . . where none was necessary."[10] Instead, in Professor Feld's view, traditional standards—reasonable suspicion and probable cause—provide a workable standard that should have been utilized in the school context. Feld believes that the lack of Fourth Amendment rights is compounded by the lack of a real remedy, leading him to conclude: "students have few rights and even fewer remedies."[11]

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[6] *Id.* at 806.

[7] Barry C. Feld, T.L.O. *and* Redding*'s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847 (2011).

[8] *Id.* at 850.

[9] *Id.* at 870.

Professor Martin R. Gardner, of the University of Nebraska College of Law, contributes *Strip Searching Students: The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law.*[12] As indicated by the title, Professor Gardner examines *Redding* in detail and finds that the opinion "fails to deliver the sufficiently clear guidance promised"[13] or needed. He believes that *Redding* raises more questions than it answers, pointing to vague and internally inconsistent language in the opinion that will "unwisely invite judicial excursion into matters of education policy,"[14] "spawn confusion,"[15] and generate additional litigation. Garner proposes a modified standard, based in part on *Redding*, to measure the propriety of strip searches. He urges "policymakers to adopt provisions that narrowly regulate, if not eliminate altogether, strip searches at schools."[16]

Mary Graw Leary, Associate Professor at the Catholic University of America Columbus School of Law, takes on the challenge of examining the *Reasonable Expectation of Privacy for Youth in a Digital Age.*[17] The Court has told us that a person's reasonable expectation of privacy is the sole interest protected by the Fourth Amendment when the government searches.[18] In her article, Professor Leary examines the many ways that young people use Internet-related technology and how that use has shaped their views of privacy. Those social trends are placed in the prism of the Supreme Court's approach to measuring privacy expectations. Leary highlights the distinct challenges of searches of digital devices by modifying the search in *Redding* to be that of a cell phone. Leary believes that that scenario demonstrates the inadequacy of the Court's current approach to measuring the reasonableness of an expectation of privacy. She maintains that the "value-laden analysis"[19] advocated by Justice Harlan offers a better approach.

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[10] *Id.* at 952.

[11] *Id.* at 953.

[12] Martin R. Gardner, *Strip Searching Students: The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law*, 80 MISS. L.J. 955 (2011).

[13] *Id.* at 956.

[14] *Id.* at 957.

[15] *Id.*

[16] *Id.*

[17] Mary Graw Leary, *Reasonable Expectation of Privacy for Youth in a Digital Age*, 80 MISS. L.J. 1035 (2011).

Professor Victor Streib, of the Ohio Northern University College of Law, focuses on younger members of our society in *Protecting Preteens: A Child's Portion of the Fourth Amendment.*[20] Professor Streib examines the "almost barren landscape"[21] of jurisprudence regarding the privacy rights of preteen children, specifically those between the ages of seven and twelve. He begins by summarizing the importance of attaining specific ages for the purpose of assigning criminal or juvenile responsibility to the actor, with particular emphasis on homicides by young children. Streib surveys Fourth Amendment cases involving children. (He also helpfully provides an appendix that lists major cases by state courts involving children's Fourth Amendment rights.) Complicating the analysis, according to Professor Streib, is the "fact that children are always assumed to be in the custody of someone, whether it be their parents or the state."[22] Further complications arise based on the broad range of roles that police are expected to engage in—from law enforcement to community caretaking. Streib contends that, when the police come in contact with juveniles for the purpose of law enforcement, the juveniles should be afforded the same protection under the Fourth Amendment as adults receive. He observes: "Greater protections should be afforded to children if police officers reasonably doubt that the child is capable of making adult-like decisions."[23] Moreover, he asserts, when the police are acting out of concern for the child's welfare, they should exercise even "greater caution in protecting the child's right to privacy, because it is more likely that the police power will conflict with what is in the best interests of the child."[24]

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[18] *E.g.*, Soldal v. Cook County, 506 U.S. 56 (1992).

[19] Leary, *supra* note 17, at 1036.

[20] Victor Strieb, *Protecting Preteens: A Child's Portion of the Fourth Amendment*, 80 MISS. L.J. 1095 (2011).

[21] *Id.* at 1096.

[22] *Id.* at 1119.

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[23] *Id.* at 1121.

[24] *Id.* at 1123.

SCHOOL SEARCHES WRIT LARGE: BROADENING THE PERSPECTIVE IN WHICH WE VIEW SCHOOL SEARCH CASES

Samuel Marion Davis[*]

INTRODUCTION

The tendency is to view Supreme Court decisions involving juveniles as "juvenile" cases rather than looking at them in a larger context, such as police interrogation cases or search and seizure cases that happen to involve juveniles. To be sure, some decisions, for example, those that concern the death penalty for juveniles[1] and, more recently, life without parole for juveniles,[2] entail considerations that are perhaps unique to juveniles.[3] Even in school search cases, one could argue the school environment itself is unique, calling for a narrow focus and special rules attending searches at school.[4] The real point, however, is that while juveniles because of their youth might be unique in terms of their maturity level and the need to exercise control over them in the school setting, cases involving juveniles nevertheless ought to be viewed in the broader context of their fit in the overall jurisprudence of the Court. Viewing them as "school search" cases or even as "search and seizure" cases limits one's perspective, whereas viewing them in a larger context opens up a new vista and leads to a greater understanding of the cases in their historical and jurisprudential context.

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[*] Dean Emeritus, Professor of Law and Holder of the Jamie L. Whitten Chair in Law and Government at the University of Mississippi School of Law. This article is based on the Keynote Address delivered at the annual Fourth Amendment Symposium sponsored by the National Center for Justice and the Rule of Law at the University of Mississippi School of Law on March 11, 2010. It is dedicated to the memory of the late Charles H. Whitebread of the University of Southern California School of Law. Charlie was a mentor, a co-author, and a dear friend. The author thanks Professor Thomas C. Clancy, Director of the National Center for Justice and the Rule of Law, for the opportunity to give the Keynote Address.

[1] *See* Roper v. Simmons, 543 U.S. 551 (2005); Thompson v. Oklahoma, 487 U.S. 815 (1988).

[2] *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011 (2010).

[3] Indeed, in *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy spent a great deal of time discussing the differences between juveniles and adults in terms of maturity and accountability and why those differences justify drawing the line at age eighteen for imposition of the death penalty consistent with the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 568-75.

[4] Justice Scalia, for example, noted in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), the "special needs" that exist in the school setting and the "custodial and tutelary" authority that school officials exercise over students in their care, which taken together, render neither the warrant nor the probable cause requirements indispensable. *Id.* at 653-55.

I. SUPREME COURT DECISIONS IN THE AREA OF SCHOOL SEARCHES

A brief survey of the four major Supreme Court decisions involving search and seizure in the school environment will aid in understanding the scope of the problem. The initial case was the Court's 1985 decision in *New Jersey v. T.L.O.*[5] In that case, a student was observed smoking in the girls' restroom in violation of school policy.[6] When called to the principal's office, she denied smoking at all.[7] The principal searched her purse, where he found cigarettes.[8] He then noticed a pack of rolling papers and, suspecting marijuana use, examined her purse further and found a small amount of marijuana, a pipe, several empty plastic bags, a large amount of cash in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated her in marijuana dealing. The evidence was turned over to the police.[9]

The Court held that the test for validity of a search of a student's person at school is reasonableness.[10] Reasonableness, the Court said, involves a two-step process. First, the search must be "justified at its inception," which means there must be reasonable grounds to suspect a search will yield evidence that the student has violated or is violating the law or the rules of the school.[11] Second, the search must be "reasonably related in scope to the circumstances which justified the interference in the first place."[12] A search is reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[13] Interestingly, the New Jersey Supreme Court, in holding that the search was unreasonable, also had employed a reasonableness test.[14] The U.S. Supreme Court, however, found that the reasonableness test used by the New Jersey court reflected "a somewhat crabbed notion of reasonableness."[15]

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[5] 469 U.S. 325 (1985).

[6] *Id.* at 328.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 341.

The next case did not come until ten years later in *Vernonia School District 47J v. Acton.*[16] Following reports of widespread drug use in the schools and that student athletes were at the center of the drug problem, the school district enacted a drug-testing program for students wishing to participate in student athletics.[17] The program required all athletes and their parents to sign a form consenting to drug testing, which would take place at the beginning of the season for the particular sport and would occur randomly throughout the season.[18] James Acton, a seventh-grader, signed up for football but was not allowed to participate because he and his parents refused to sign the consent form.[19] The Actons filed suit alleging that the drug-testing program violated the Fourth Amendment.[20]

The Court held that the school district's drug-testing program, designed to curb district-wide drug use, was not an unreasonable search and seizure under the Fourth Amendment.[21]

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[11] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[12] *Id.* (quoting *Terry*, 392 U.S. at 20).

[13] *Id.* at 341-42.

[14] State v. Engerud, 463 A.2d 934, 941-42 (N.J. 1983), *rev'd sub. nom.*, New Jersey v. T.L.O, 469 U.S. 325 (1985).

[15] *T.L.O.*, 469 U.S. at 343.

[16] 515 U.S. 646 (1995).

[17] *Id.* at 648-50.

[18] *Id.* at 650.

[19] *Id.* at 651.

[20] *Id.* at 648-51.

[21] *Id.* at 664-66.

In so holding, the Court emphasized the "special needs" of law enforcement in public schools and the lower expectation of privacy of students, particularly student athletes, who routinely are subject to physical examinations and shared locker rooms.[22] The Court also reasoned that student athletes subject themselves to a greater degree of regulation than that imposed on students generally, and, as such, should be accustomed to intrusions on their privacy.[23] The Court *appeared* to justify the policy because the school district was dealing with a serious drug problem and student athletes were perceived as leaders of the drug culture.[24] That notion vanished in the next case decided by the Court.

In *Board of Education v. Earls*,[25] the Court once again addressed the issue of suspicionless drug searches by school officials. In this case, however, the school district adopted a policy calling for all middle-and-high-school students desiring to participate in *any* extracurricular activity, not just athletics, to consent to urinalysis drug testing as a condition of participation.[26] Lindsey Earls, a high-school student, participated in the marching band, show choir, academic team, and the National Honor Society, but when the policy went into effect, she refused to sign the consent form.[27] Her parents filed suit claiming the policy violated the Fourth Amendment.[28]

Applying the "special needs" analysis of *Acton*, the Supreme Court upheld the district's policy as an exercise of its legitimate interest in protection of students in its care against the dangers of drug use.[29] Justice Thomas, writing for the Court, dismissed the notion that the Court's decision in *Acton* was based on pervasive drug use among students and the claim that student athletes were at the core of the drug problem.[30] Rather, he said, *Acton* was based on the "custodial and tutelary" responsibility that schools have for students while at school and the "special needs" that justify increased security in the school and less than full Fourth Amendment protection in the school environment.[31] The method of testing was deemed "minimally intrusive" because the results were kept confidential.[32] If a student tested positive for drugs, he or she would be ineligible to participate in the activity but would not be reported to law enforcement or disciplined in any other way.[33] Nevertheless, the significance of *Earls* was that it extended *Acton* to allow drug testing of all students who choose to participate in *any* extracurricular activity.[34] Following *Earls*, the scholarly commentary on both *Acton* and *Earls* has been very critical.[35]

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[22] *Id.* at 653-57.

[23] *Id.* Justice O'Connor, joined by Justices Stevens and Souter, dissented, arguing that drug testing of student athletes can only be reasonable when justified by some level of individualized suspicion. *Id.* at 676-84 (O'Connor, J., dissenting).

[24] *Id.* at 661-64 (majority opinion).

[25] 536 U.S. 822 (2002).

[26] *Id.* at 826.

[27] *Id.*

[28] *Id.* at 826-27.

[29] *Id.* at 828-30.

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[30] *Id.* at 835-36.

[31] *Id.* at 831 & n.3, 837-38. This difference in factual circumstances between *Acton* and *Earls*, however, led Justice Ginsburg to dissent in the *Earls* case even though she had voted with the majority in *Acton*. *Id.* at 843-45 (Ginsburg, J., dissenting).

[32] *Id.* at 832-34 (majority opinion).

[33] *Id.*

[34] Would drug-testing of students who apply for an on-campus parking permit be permissible under the rationale of *Earls*? *See* Jared M. Hartman, Note, *Pee-to-Park: Should Public High School Students Applying for On-Campus Parking Privileges Be Required to Pass a Drug Test?*, 18 J.L. & HEALTH 229 (2004). Would not the logic of *Earls* extend to permitting random drug testing of all students generally? If one agrees with Justice Thomas's assertion that the central compelling feature of the *Acton* analysis is the custodial and tutelary duty that the state owes to schoolchildren—and apparently a majority of the Court does—what is to prevent such a broad interpretation? *See* Jacob L. Brooks, Case Note, *Constitutional Law—Suspicionless Drug Testing of Students Participating in Non-Athletic Competitive School Activities: Are All Students Next?* Board of Education v. Earls, *536 U.S. 822 (2002)*, 4 WYO. L. REV. 365 (2004).

[35] *See* Irene Merker Rosenberg, *The Public Schools Have a "Special Need" for Their Students' Urine*, 31 HOFSTRA L. REV. 303 (2002); Floralynn Einesman & Howard Taras, *Drug Testing of Students: A Legal and Public Health Perspective*, 23 J. CONTEMP. HEALTH L. & POL'Y 231 (2007); John F. Donaldson, Note, *Life, Liberty, and the Pursuit of Urinalysis: The Constitutionality of Random Suspicionless Drug Testing in Public Schools*, 41 VAL. U. L. REV. 815 (2006); Kari L. Higbee, Comment, *Student Privacy Rights: Drug Testing and Fourth Amendment Protections*, 41 IDAHO L. REV. 361 (2005); M. Casey Kucharson, Note, *Please Report to the Principal's Office, Urine Trouble: The Effect of* Board of Education v. Earls *on America's Schoolchildren*, 37 AKRON L. REV. 131 (2004); Thomas Proctor, Comment, *Constitutionality of Testing High School Male Athletes for Steroids Under* Vernonia School District v. Acton *and* Board of Education v. Earls, 2005 B.Y.U. L. REV. 1335.

The most recent school search case decided by the Supreme Court, *Safford Unified School District #1 v. Redding*,[36] involved the constitutionality of the strip search of a student at school. Thirteen-year-old Savana Redding was taken from class and brought to the principal's office where she was told that a fellow student had reported Savana was distributing drugs at school.[37] She denied the accusation and offered to let the assistant principal, Kerry Wilson, search her belongings.[38] Wilson and an administrative aide, Romero, searched Savana's backpack and found nothing.[39] Wilson then directed Romero to take Savana to the school nurse's office to search her clothing.[40] There Romero and the school nurse directed Savana to remove her outer clothing and her shoes and socks.[41] As she stood there in her underwear, they directed her to pull out her bra and shake it and to pull out the elastic on her underpants and to shake them.[42] The strip search revealed nothing.[43] Savana's mother filed suit alleging a violation of her Fourth Amendment rights.[44]

With only Justice Thomas dissenting on this issue,[45] the Court held the strip search was unreasonable and violated Savana's Fourth Amendment rights.[46] While there was some uncertainty as to what constitutes a "strip search," Justice Souter, writing for the Court, made it clear that he was referring to the search of Savana's bra and underpants. He stated: "The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it."[47] It was this "final step" that seems to have shocked the conscience of the Court. Savana herself described the last part of the search as

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[36] 129 S. Ct. 2633 (2009).

[37] *Id.* at 2638.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 2646 (Thomas, J., concurring in part & dissenting in part).

[46] *Id.* at 2642-44 (majority opinion).

[47] *Id.* at 2641.

"embarrassing, frightening, and humiliating."[48] Justice Souter observed that "both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings."[49]

The Court adhered to the reasonable suspicion test it had first adopted in *New Jersey v. T.L.O.*, i.e., that a search is reasonable "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[50] The Court found that the information Wilson possessed was sufficient to warrant his suspicion that Savana might be involved in pill distribution on campus and that his suspicion was enough to justify a search not only of her backpack but of her outer clothing as well.[51] Had Romero and the school nurse conducted what some might call a strip search, up to the point of searching Savana's underwear, the Court apparently would have found no Fourth Amendment violation.

It was the final step, however, that seems to have shocked the Court and to have persuaded all but one of the Justices that a violation of personal privacy of significant proportions occurred. Again referring to *T.L.O.*, Justice Souter emphasized that a search must be "reasonably related in scope to the circumstances which justified the intrusion in the first place" and that the scope is permissible when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[52]

Justice Souter concluded, based on the reasonableness standard, that "[h]ere the content of the suspicion failed to match the degree of intrusion."[53] The "distinct elements of justification," to which he had referred earlier, were missing in this case. What was missing, he said, was "any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear."[54] Justice Souter made no reference to *Acton* or *Earls* in his opinion.

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 2639 (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

[51] *Id.* at 2639-41.

[52] *Id.* at 2642 (quoting *T.L.O.*, 469 U.S. at 341-42).

[53] *Id.*

Justice Thomas, the lone dissenter on the question of whether a Fourth Amendment violation had occurred, did cite *Acton* and *Earls* in his separate opinion. He argued that school officials are allowed considerable authority to maintain order and discipline in the schools and that drugs pose a serious danger for students in the school environment.[55] For these reasons, he concluded the strip search in this case was reasonable.[56]

II. A BROADER CONTEXT: THE JURY TRIAL CASES

The purpose of the review of Supreme Court "school search" cases was to make that very point, i.e., that we tend to view them in isolation, as "school search" cases. If they are viewed in a broader sense at all, they still are viewed as "search and seizure" cases. Instead, they should be viewed in an even larger context as part of the Court's overall constitutional jurisprudence in addressing issues in the area of criminal procedure. One helpful comparison is to consider cases in the area of right to jury trial.

In *McKeiver v. Pennsylvania* in 1971, the Supreme Court held that juveniles are not constitutionally entitled to the right to jury trial in juvenile proceedings.[57] The decision came as somewhat of a surprise because it was a departure from the Court's two previous decisions of *In re Gault*[58] and *In re Winship*[59] in which the Court had extended certain rights to juveniles as a matter of due process of law. *Gault* was the watershed case that constitutionalized the juvenile process by declaring that in delinquency proceedings juveniles are entitled to notice of the hearing; the right to counsel, including court-appointed counsel; the right to confrontation and cross-examination; and the privilege against self-incrimination.[60] In *Winship*, the Court held that the standard of proof in delinquency proceedings is proof beyond a reasonable doubt.[61] *McKeiver* was to have been the next logical step in the progression, with the Court extending the rationale first enunciated in *Gault* to declare that the right to jury trial was guaranteed to juveniles by due process of law. But it was not to be.

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[54] *Id.* at 2642-43.

[55] *Id.* at 2657-58 (Thomas, J., concurring in part & dissenting in part).

[56] *Id.* at 2646-47, 2657-58.

[57] 403 U.S. 528, 545 (1971).

[58] 387 U.S. 1 (1967).

[59] 397 U.S. 358 (1970).

The tendency is to view *McKeiver* as a "juvenile" case. Viewing it as such makes it somewhat difficult to understand—difficult, that is, to understand the Court's departure from the due process analysis begun in *Gault*. *McKeiver* is more readily understood, however, if it is viewed not as a "juvenile" case but rather as a "jury trial" case, one in a series of jury trial cases that the Court decided during the 1970s.

Of course, the Court was in transition during this period in its history. During the period of the 1960s the Court was known as the "Warren Court" because of former Chief Justice Earl Warren. That period was known for the extension of many rights to criminal defendants in state court proceedings as a matter of due process of law under the Fourteenth Amendment. Some examples include *Mapp v. Ohio*[62] in 1961, *Miranda v. Arizona*[63] in 1966, and *Duncan v. Louisiana*[64] in 1968. By the 1970s, however, Chief Justice Warren had been replaced on the Court by Chief Justice Warren E. Burger, and a new era, a more conservative era, commenced on the Court, known then as the "Burger Court."

One of the holdovers from the Warren era was Justice John Marshall Harlan. In *McKeiver*, decided at the beginning of the Burger era, Justice Harlan argued in his concurring opinion that the right to jury trial was not required by due process of law in state court juvenile proceedings because, in his view, it was not required by due process in state court criminal proceedings either.[65] He pointed out that he had dissented[66] in *Duncan v. Louisiana* in the waning years of the Warren Court, in which the Court had held the Sixth Amendment right to jury trial applicable to state court criminal proceedings under the Due Process Clause of the Fourteenth Amendment. His argument raises an interesting question. Would the Court that decided *McKeiver v. Pennsylvania* in 1971 have decided *Duncan v. Louisiana* differently in 1968?

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[60] *Gault*, 387 U.S. at 33-34, 41, 55, 57.

[61] *Winship*, 397 U.S. at 367-68.

[62] 367 U.S. 643 (1961).

[63] 384 U.S. 436 (1966).

[64] 391 U.S. 145 (1968).

Not only was Justice Harlan's vote in *McKeiver* predictable, other votes on the Court were predictable as well. Justice Potter Stewart had dissented[67] in *Gault* itself, so he was not likely to vote to extend the logic of *Gault* to the right to jury trial. Chief Justice Warren Burger had dissented[68] in *In re Winship* in 1970, so he too was no friend of extending the due process analysis of *Gault*. And Justice Harry Blackmun, new to the Court and an old friend of Chief Justice Burger from Minnesota, voted so often with the Chief Justice that the two were known as the "Minnesota Twins."[69] Indeed, Justice Blackmun ended up writing the opinion of the Court in *McKeiver*. Again, one must ask the question whether the Burger Court that decided *McKeiver* in 1971 would have decided *Duncan v. Louisiana* differently in 1968.

Duncan v. Louisiana was the first in a series of Supreme Court decisions addressing the right to jury trial. The Court in that case held the Sixth Amendment right to jury trial applicable to the states via the Due Process Clause of the Fourteenth Amendment.[70] From that point on, however, the Court began to diminish the right to jury trial. In 1970, the Court held in *Williams v. Florida* that the traditional structure calling for juries of twelve persons was a "historical accident" and was not binding; juries of six, therefore, were permissible.[71] Two years later the Court held in a pair of companion cases, *Johnson v. Louisiana*[72] and *Apodaca v. Oregon*,[73] that less than unanimous verdicts, such as nine to three in Louisiana and ten to two in Oregon, were constitutional.[74] The Court then drew a line beyond which it was not willing to go, however, holding in *Ballew v. Georgia* that juries of five were unconstitutional[75] and in *Burch v. Louisiana* that less than unanimous verdicts on juries of six were unconstitutional.[76]

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[65] McKeiver v. Pennsylvania, 403 U.S. 528, 557 (1971) (Harlan, J., concurring).

[66] *Duncan*, 391 U.S. at 171 (Harlan, J., dissenting).

[67] *In re* Gault, 387 U.S. 1, 78 (1967) (Stewart, J., dissenting).

[68] *In re* Winship, 397 U.S. 358, 375 (1970) (Burger, C.J., dissenting).

[69] Louis M. Kohlmeier, *The Burger Bench*, WALL ST. J., June 23, 1971, at 1. Indeed, during his first five terms Justice Blackmun voted with Chief Justice Burger 87.5% of the time in closely divided cases. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 186 (2005).

[70] *Duncan*, 391 U.S. at 149.

If *McKeiver v. Pennsylvania* is less easily understood as a "juvenile" case, it is more readily understood as a "jury trial" case. *McKeiver* was decided in the midst of the above series of cases in which the Burger Court scaled back the scope of the right to jury trial. As it did more recently in *Redding* in the area of "school searches," however, the Court reached a point, in *Ballew* and *Burch*, at which it balked against any further retreat from the Sixth Amendment right to jury trial.

III. ANOTHER COMPARATIVE CONTEXT: THE FIRST AMENDMENT CASES

To appreciate fully how restrictive the Supreme Court has been in applying the Fourth Amendment in the school environment, one need look no further than the Court's decisions in the area of First Amendment right of free expression in schools. One of the earliest and most significant of those decisions is *Tinker v. Des Moines Independent Community School District*, in which the Court held that under the facts of that case, the school board's policy banning the wearing of black armbands to protest the war in Vietnam violated students' right of free expression.[77] The Court in *Tinker* made the often quoted statement, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[78] This statement is especially profound when one considers that the rights set forth in the First Amendment enjoy a preferred status.[79] In later decisions, however, and in one recent decision, the Court retreated from the protective stance taken in *Tinker*.

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[71] 399 U.S. 78, 89, 103 (1970).

[72] 406 U.S. 356 (1972).

[73] 406 U.S. 404 (1972).

[74] *Johnson*, 406 U.S. at 362; *Apodaca*, 406 U.S. at 411.

[75] 435 U.S. 223, 244-45 (1978).

[76] 441 U.S. 130, 138-39 (1979).

[77] 393 U.S. 503, 513 (1969).

In *Tinker*, the Court noted that the wearing of armbands did not interfere with the work of the schools or the rights of other students.[80] Quoting with approval a Fifth Circuit decision,[81] the Court said that in the absence of a finding that the conduct would "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,'" the prohibition against wearing of armbands could not be sustained.[82] In *Bethel School District No. 403 v. Fraser*, the school district obviously had relied on this language in enacting a policy prohibiting conduct "which materially and substantially interferes with the educational process."[83] Nevertheless, in *Fraser*, the Court held that the school district's action in disciplining a student who had made sexually suggestive remarks in a nomination speech in a student assembly did not infringe on his First Amendment rights.[84]

Although it involved First Amendment freedom of press rather than free expression, the Court's decision two years later in *Hazelwood School District v. Kuhlmeier*[85] is instructive. In that case, the Court upheld a principal's action in deleting two articles from a school newspaper.[86] Critical to the Court's decision was its conclusion that the school newspaper was not a traditional public forum and was produced for educational purposes to teach students to write, edit, and publish a newspaper.[87]

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[78] *Id.* at 506.

[79] *See* Kovacs v. Cooper, 336 U.S. 77, 88 & n.14 (1949); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); *see also* Emp't Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 895 (1990) (O'Connor, J., concurring); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[80] *Tinker*, 393 U.S. at 508.

[81] *See* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

[82] *Tinker*, 393 U.S. at 513 (quoting *Burnside*, 363 F.2d at 749).

[83] 478 U.S. 675, 678 (1986).

[84] *Id.* at 685-86.

[85] 484 U.S. 260 (1988).

[86] *Id.* at 274-75.

Most recently, in *Morse v. Frederick*, the Court was confronted with a claim that a school principal's confiscation of a banner reading "BONG HiTS 4 JESUS" violated a student's First Amendment right of free expression.[88] The student, along with other students, had displayed the banner across the street from the school as the Olympic Torch Relay passed by the school.[89] The principal, viewing the banner as promoting illegal drug use, ordered the students to take it down.[90] All of them complied except Frederick.[91] The principal then confiscated the sign and later suspended Frederick.[92] The Court upheld the principal's action as a legitimate exercise of the broad authority given to school officials in supervising and regulating the conduct of students in their care.[93] The Court clearly viewed this as a "school speech" case, where free expression is more limited than in the non-school context.[94]

In all of the First Amendment cases, the Court paid homage to its statement in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[95] Nevertheless, in each instance, the Court pointed out that freedom of expression in the school setting is not co-extensive with that of adults in the broader, non-school context but rather is limited because of the special need to maintain order and discipline in an environment in which learning can take place.[96] This view in the area of First

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[87] *Id.* at 268-70.

[88] 551 U.S. 393, 409-10 (2007).

[89] *Id.* at 397.

[90] *Id.* at 398.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 409-10.

[94] *Id.* at 400-01.

[95] *Id.* at 396; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist. 593 U.S. 503, 506 (1969).

[96] *Frederick*, 551 U.S. at 396-97; *Kuhlmeier*, 484 U.S. at 266-67; *Fraser*, 478 U.S. at 682-83.

Amendment rights is not unlike the "special needs" rationale in the Fourth Amendment context first mentioned by Justice Scalia in *Acton*.[97]

IV. "SCHOOL SEARCH" CASES IN THE CONTEXT OF SEARCH CASES GENERALLY

The "school search" cases also are better understood when viewed in the context of the Court's decisions in Fourth Amendment cases generally. Since the Court's initial decision in *Mapp v. Ohio*, the Court has pulled back from any expansion of Fourth Amendment protections. In *South Dakota v. Opperman*, the Court held that the routine inventory search of petitioner's locked car, which had been lawfully impounded for several parking violations, was reasonable.[98] In *Illinois v. Gates*, the Court approved a new totality-of-circumstances test for determining the sufficiency of an informant's tip to establish probable cause for a search warrant, and in applying that test the Court upheld the search of petitioner's home and car based on an anonymous letter indicating he was involved in drug violations.[99] In *United States v. Leon*, the Court held that the exclusionary rule should not be applied to exclude the prosecution's evidence seized pursuant to a search warrant ultimately shown to be invalid, where the officer reasonably relied on the issuing magistrate's determination of probable cause.[100] Following the Court's decision in *Leon*, the Court decided the *T.L.O.-Acton-Earls* triad.

In *Illinois v. Caballes*, the Court held that a search of the trunk of petitioner's car and a subsequent seizure of drugs were reasonable where following a routine traffic stop a drug-sniffing dog alerted to his trunk and he had not been detained longer than normal for issuance of a warning traffic citation.[101] In *Hudson v. Michigan*, the Court further limited the application of the Fourth Amendment's exclusionary rule holding it inapplicable to a violation of the "knock-and-announce" rule that requires law enforcement officers to give advance warning before entering a private residence.[102] Following these cases, however, as pointed out earlier,[103] the Court in *Redding* was more supportive of Fourth Amendment protection holding that the strip search of a thirteen-year-old student at school violated her constitutional rights.

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[97] Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 653-57 (1995).

[98] 428 U.S. 364, 375-76 (1976).

[99] 462 U.S. 213, 238, 245-46 (1983).

[100] 468 U.S. 897, 926 (1984).

[101] 543 U.S. 405, 410 (2005).

CONCLUSION

The purpose of this article was to demonstrate that "school search" cases can—and should—be viewed in a larger context. To use an analogy, one might view a painting by Claude Monet, e.g, his "soleil levant" (Impression, sunrise), in isolation. One could appreciate the beauty of his work, but one could appreciate his artistry much better by viewing other works by Monet and could understand the style of Impressionism—the brush strokes, the use of light, the human perception and experience, the use of simple subjects—much better by viewing works of other Impressionists, such as Cézanne, Degas, Renoir, Morisot, Manet, and others. And, of course, one could further appreciate and understand the Impressionist period by comparing it to earlier and later styles, for example, Post-impressionism and Cubism.[104]

In similar fashion, one can gain a fuller understanding of the school search cases by looking at them in different and broader contexts, e.g., by viewing them in context with search and seizure cases generally or in context with school cases involving First Amendment issues and by comparing them with cases in other areas, such as the Sixth Amendment right to jury trial. By broadening the perspective one has of school search cases, one can develop a sense of the historical and philosophical texture of the cases and how they fit into the overall constitutional jurisprudence of the Supreme Court.

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[102] 547 U.S. 586, 589-90 (2006).

[103] *See supra* notes 36-56 and accompanying text.

[104] *See generally* JOHN REWALD, THE HISTORY OF IMPRESSIONISM (4th rev. ed. 1973).

SCHOOL CHILDREN AND PAROLEES: NOT SO SPECIAL ANYMORE

Edwin J. Butterfoss[*]

INTRODUCTION

In his contribution to this symposium, *School Searches Writ Large: Broadening the Perspective in Which We View School Search Cases*, Dean Samuel Davis suggests much can be learned by attempting to view the school search cases in a larger context as part of the Supreme Court's overall jurisprudence. That is the goal of this paper: to examine the school search cases through the prism of the Court's suspicionless search and seizure jurisprudence and, on this twenty-fifth anniversary of the Court's decision in *New Jersey v. T.L.O.*,[1] to explore what lessons that landmark case and other school search cases can teach us about the Court's suspicionless search jurisprudence, as well as what some recent non-school suspicionless search cases tell us about the continuing vitality of those lessons in and out of schools.

The title of this article reflects one of *T.L.O.*'s contributions to the area of suspicionless searches—the special needs exception—and tries to capture my contention that the special needs exception has been eliminated, or may be on the verge of elimination, in two areas that gave it its genesis: searches of school children[2] and searches of probationers/parolees.[3] In fact, the exception may have been eliminated entirely from the Court's suspicionless search jurisprudence in favor of what the Court calls its "general Fourth Amendment approach."[4]

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[1] 469 U.S. 325 (1985).

[2] *See id.* at 351 (Blackmun, J., concurring in the judgment) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

This article first will briefly review the Court's suspicionless search jurisprudence. Next the article will explain where *T.L.O.* and the school searches fit into that jurisprudence and explore the lessons to be learned from those cases. Finally, the article will finish by examining what placing two recent parolee/probationer search cases and the most recent school search case, *Safford Unified School District #1 v. Redding*,[5] into the mix means for the Court's suspicionless search jurisprudence and for searches of students. This final part will analyze what the Court's new "general Fourth Amendment approach" might mean in the school search setting.

I. THE SUPREME COURT'S SUSPICIONLESS SEARCH JURISPRUDENCE[6]

Although the jurisprudence of the Court in the suspicionless search area is muddled and confused,[7] it starts with a basic and important proposition: the Supreme Court insists that suspicionless searches are the exception to the rule.[8] The Court

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[3] *See* Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (holding that the warrantless search of a probationer's home was reasonable within the meaning of the Fourth Amendment "because it was conducted pursuant to a valid regulation governing probationers").

[4] United States v. Knights, 534 U.S. 112, 118 (2001) (citing Ohio v. Robinette, 519 U.S. 33, 39 (1996)).

[5] 129 S. Ct. 2633 (2009).

[6] This section of the article draws heavily from a previous article exploring in more depth the Supreme Court's suspicionless search jurisprudence. *See* Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419 (2007).

[7] *See id.* at 422 n.23 (citing Stephen J. Schulhofer, *On The Fourth Amendment Rights Of The Law-Abiding Public*, 1989 SUP. CT. REV. 87, 88-89 (referring to "doctrinal incoherence" in this area)).

[8] *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665 (1989) ("[A] search must be supported, as a general matter, by a warrant issued upon probable cause."); *id.* at 667 ("Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause.").

has repeatedly stated as a basic tenet of Fourth Amendment jurisprudence that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."[9] Of course, that is the ordinary or general rule. The Court has also expressly stated that "such suspicion is not an 'irreducible' component of reasonableness."[10] Nevertheless, the Court has emphasized that permissible suspicionless searches fall within a "closely guarded category,"[11] suggesting very few, limited exceptions to the general rule requiring individualized suspicion. The obvious question is what types of searches are within this "closely guarded category" of permissible suspicionless searches? That question is surprisingly difficult to answer.

A. The Starting Point

The Supreme Court's suspicionless search jurisprudence begins with *Camara v. Municipal Court of San Francisco.*[12] In *Camara*, the lessee of an apartment refused to permit a housing inspector to enter his apartment without a warrant and was criminally charged with "refusing to permit a lawful inspection."[13] Under the prevailing law, an inspection such as the one in question was not considered a search.[14] In *Camara*, the Court overruled the existing precedent and found the inspection to be a search governed by the Fourth Amendment, including the warrant requirement.[15] Since the Fourth Amendment is clear that "no Warrants shall issue, but upon probable cause,"[16] and because probable cause had always been understood to require some level of individualized suspicion,[17] the Court was forced to redefine probable cause in order to authorize warrants to carry out routine administrative inspections that were not premised on the existence of individualized suspicion of code violations.[18] It did so by equating probable cause with "reasonableness" and creating a balancing test to determine reasonableness, declaring that, "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[19] By utilizing a balancing test, the Court eliminated any requirement of a minimum quantum of individual suspicion and opened the door to suspicionless searches and seizures.[20]

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[9] City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (citing Chandler v. Miller, 520 U.S. 305, 308 (1997)); *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976). On at least two occasions, the Court has struck down a suspicionless search scheme because it did not "fit within the closely guarded category of constitutionally permissible suspicionless searches." Ferguson v. City of Charleston, 532 U.S. 67, 77 (2001); *see also Chandler*, 520 U.S. at 309.

[10] *Edmond*, 531 U.S. at 37 (quoting *Martinez-Fuerte*, 428 U.S. at 561).

[11] *Ferguson*, 532 U.S. at 77; *see also Chandler*, 520 U.S. at 309.

[12] 387 U.S. 523 (1967).

[13] *Id.* at 527.

[14] Frank v. Maryland, 359 U.S. 360 (1959).

[15] *See Camara*, 387 U.S. at 534.

[16] U.S. CONST. amend. IV.

After *Camara*, there were two ways to assess the constitutionality of a search: the warrant approach and the reasonableness approach.[21] Under the warrant approach, all searches without a warrant are per se unreasonable unless they fall within one of the "few specifically established and well-delineated exceptions."[22] Moreover, those exceptions generally forgive the requirement of a warrant, not the requirement of probable cause (defined as a quantum of individualized suspicion) to support the search.[23] Under the reasonableness approach of *Camara*, by contrast, the question of whether a search is constitutional is determined through a balancing test.[24] A search is reasonable if the interests of the government in carrying out the search outweigh the "costs" to the citizen of being subjected to the search in terms of the intrusion upon the citizen's privacy or liberty.[25] Individualized suspicion is not necessarily required.[26]

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[17] *See supra* text accompanying note 9.

[18] *Camara*, 387 U.S. at 535-36.

[19] *Id.* at 536-37.

[20] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 230, 231 (4th ed. 2004); Scott E. Sundby, *Protecting the Citizen "Whilst He is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L.J. 501, 550 (2004).

[21] *See, e.g.*, Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985) (stating that there are two models of the Fourth Amendment: the reasonableness approach and the warrant approach); Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia's Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law*, 82 TUL. L. REV. 77, 78 (2004) ("The issue of whether searches and seizures . . . should be governed by a per se rule based on the Warrant Clause of the Fourth Amendment or a more general rule of reasonableness based on the Reasonableness Clause of that Amendment has plagued the United States Supreme Court for decades.").

[22] Katz v. United States, 389 U.S. 347, 357 (1967).

[23] *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925) (holding that a warrantless search of an automobile is reasonable and does not violate the Fourth Amendment provided the searching officer has probable cause that the vehicle contains contraband); California v. Acevedo, 500 U.S. 565 (1991) (holding that an officer may search a container in a vehicle without a warrant provided the officer has probable cause to

The question for government officials seeking to utilize this new tool was how to qualify to have their actions tested by the balancing test. What justifies using the balancing test rather than the traditional "per se warrant approach"? It is important to keep in mind that the government had a significant incentive to have their actions judged by the balancing test. That test could forgive a warrant, probable cause, and even individualized suspicion. A simple answer to the question of when the use of the balancing test was justified or permitted was not immediately forthcoming from the Court, but there were hints.

In *Camara*, the Court relied heavily on the fact that the search in question was an administrative search, not a search seeking evidence of crime.[27] As a result, *Camara* was viewed as having created an administrative search exception that permitted suspicionless searches.[28] Although the first case to utilize the reasonableness approach and balancing test was *Terry v. Ohio*, a case involving a search seeking evidence of criminal activity,[29] searches without individualized suspicion were viewed as being justified only in the administrative search set-

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believe the container contains contraband even if the officer does not have probable cause as to the whole vehicle); Chimel v. California, 395 U.S. 752 (1969) (holding that incident to a lawful custodial arrest, officers may search the arrestee's person and the area within the arrestee's immediate control without a warrant); Warden v. Hayden, 387 U.S. 294 (1967) (holding that a police officer may enter a home and search without a warrant when the exigencies of the situation demand it).

[24] *Camara*, 587 U.S. at 536-37.

[25] *Id.*

[26] LaFave et al., *supra* note 20, at 213; Sundby, *supra* note 20, at 550.

[27] *Camara*, 387 U.S. at 535-38.

[28] *See* Butterfoss, *supra* note 6, at 432 n.75.

[29] 392 U.S. 1 (1968).

ting.[30] This notion was reinforced in a group of early cases in which the Court upheld suspicionless searches in the form of statutory inspection programs easily classified as administrative searches of the type at issue in *Camara*, including inspections of gun dealers,[31] liquor distributors,[32] and similar businesses.[33] However, the balancing test was also used in situations beyond typical administrative inspections.

B. The Early Cases

One of the first cases in which the Court utilized the balancing test to uphold a search outside the context of an administrative search was *United States v. Martinez-Fuerte*, an immigration checkpoint case.[34] To attempt to stem the flow of immigrants crossing the border illegally, the government instituted a program of roving patrols and checkpoints.[35] When each of these tactics was challenged, the government sought to justify the actions undertaken by Border Patrol agents without individualized suspicion by analogizing to the administrative search cases and arguing the government actions were more like administrative searches (subject to the balancing test) than the typical automobile searches for criminal activity,[36] which were subject to the warrant approach and required probable cause.[37]

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[30] *See, e.g.*, Peter S. Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since* Camara *and* See, 61 CAL. L. REV. 1011, 1015-16 (1973) (describing the *Camara* individualized suspicion standard as "far too loose to be applied in the criminal search context"); Brief for Respondent at 14, United States v. Martinez-Fuerte, 428 U.S 543 (1976) (No. 74-1560) ("The petitioner's proposed analogy to administrative inspection cases is inapplicable and does not justify the emasculation . . . of the reasonable suspicion standard for vehicular stops announced in *Brignoni-Ponce*.").

[31] United States v. Biswell, 406 U.S. 311 (1972) (holding that a warrantless search of a gun dealer's locked storeroom during business hours did not violate the Fourth Amendment).

[32] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (holding that, in the absence of congressional authorization, forcible entry to perform an administrative search without a warrant is a violation of the Fourth Amendment).

[33] See v. City of Seattle, 387 U.S. 541, 542 (1967) ("*Camara* applies to similar inspections of commercial structures which are not used as private residences.").

[34] 428 U.S. 543 (1976).

[35] *Id.* at 552.

[36] *See id.* at 560-62.

In the cases involving searches of automobiles by roving patrols and at checkpoints, the Court rejected the analogy to administrative searches because the officers had largely unfettered discretion to exercise their authority: "The search [in this case] thus embodied precisely the evil the Court saw in *Camara* when it insisted that the 'discretion of the official in the field' be circumscribed by obtaining a warrant prior to the inspection."[38] When the government intrusion was limited to a seizure at a permanent checkpoint where every car was momentarily detained, the Court held the government activity constitutional.[39] But the Court did not reach this different result because it accepted the analogy to the administrative search cases. The Court emphasized that "[t]he fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel."[40] And the Court repeatedly referred to the checkpoints as being for "law enforcement purposes."[41] The new result was based on the more limited intrusion imposed by the checkpoints—whether for administrative purposes or law enforcement purposes—and the limits on the discretion of the officer in the field.[42]

Despite these immigration cases where the Court seemed to uphold suspicionless searches outside the administrative context, the idea that the exception permitting suspicionless searches was for administrative searches persisted, in large part because that distinction—administrative purpose versus law enforcement purpose—was emphasized in another set of cases where the requirement of individualized suspicion was forgiven: inventory searches.

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[37] Under the automobile exception, only probable cause, but not a warrant, was required. Carroll v. United States, 267 U.S. 132 (1925).

[38] Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973) (quoting Camara v. Mun. Court of S.F., 587 U.S. 523, 532-33 (1967)); *see also* United States v. Ortiz, 422 U.S. 891, 895 (1975) (stating that "[m]oreover we are not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search").

[39] *Martinez-Fuerte*, 428 U.S. at 558-59.

[40] *Id.* at 560 n.14.

[41] The first sentence of the opinion states, "These cases involve criminal prosecutions for offenses relating to the transportation of illegal Mexican aliens." *Id.* at 545. The Court also stated, "Interdicting the flow of illegal [aliens] poses formidable law enforcement problems." *Id.* at 552. The Court also noted that "the needs of law enforcement are furthered by this location." *Id.* at 562 n.15. And, in upholding the "secondary inspection" of a limited number of cars, the Court stated that reliance on apparent Mexican ancestry "clearly is relevant to the law enforcement need to be served." *Id.* at 564 n.17.

[42] *Id.* at 557-60.

The distinction between a search with an administrative purpose and a law enforcement purpose was especially emphasized in *South Dakota v. Opperman*, a case involving the search of an automobile towed because it was parked in violation of parking regulations.[43] In justifying the use of the balancing test to assess the constitutionality of the search, the Court noted, "The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures."[44] The Court also explained, "The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations."[45] Although the Court has always treated inventory cases as a separate category of permissible suspicionless searches,[46] this language encouraged the notion that suspicionless searches were permissible only in the noncriminal, administrative setting.[47] But then along came *T.L.O.*

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[43] 428 U.S. 364 (1976).

[44] *Id.* at 370 n.5.

[45] *Id.*

[46] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 16.01[B], at 266 (3d ed. 2002) (characterizing inventory searches as a separate category and explaining this resulted "largely for historical reasons"); Butterfoss, *supra* note 6, at 442 ("For reasons that are not apparent, the Court has treated inventory searches as a separate category of intrusion unrelated to the 'closely guarded category of constitutionally permissible suspicionless searches and seizures' spawned by *Camara*." (citation omitted)).

[47] *See also* Colorado v. Bertine, 479 U.S. 367, 372 (1987) (stating that "as in Opperman . . . there was no showing that the police . . . acted in bad faith or for the sole purpose of investigation").

C. New Jersey v. T.L.O. *and the Expansion of the "Constitutionally Permissible Suspicionless Search" Category*

Along with *Camara, T.L.O.* is one of the seminal cases in the Supreme Court's suspicionless search jurisprudence. It is particularly curious how *T.L.O.* came to occupy that status given that it was not a suspicionless search case—the vice principal in the case had reasonable suspicion that T.L.O. was violating school rules.[48] And *T.L.O.* also does not seem to fit the administrative search category. The search was not part of a program of inspections (for instance, a locker inspection); it was an ad hoc decision by a school official based on a report of a possible violation of school rules.[49] Nevertheless, the decision in *T.L.O.* seemed to provide a definition of the "category" of permissible suspicionless searches to which the Court had been referring and to lay the groundwork for a broad expansion of that category.[50]

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[48] New Jersey v. T.L.O., 469 U.S. 325, 328, 345-47 (1985).

[49] *Id.* at 328.

[50] *See id.* at 340-41. In determining that the search of T.L.O. was reasonable, the Court referenced several suspicionless search cases, suggesting a unified category:

> Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," we hold today that school officials need not obtain a warrant before searching a student who is under their authority.
>
> The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required." Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

Id. at 340-41 (internal citations omitted).

In *T.L.O.*, the Court upheld a search of a student's purse by school authorities without a warrant and without probable cause.[51] In his majority opinion, without any explanation, as if it were the general rule, Justice White proceeded directly to a balancing test as the appropriate test for assessing government conduct subject to the Fourth Amendment's proscriptions.[52] He baldly stated: "The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'"[53] If, as suggested by the majority's approach, the balancing test is the general rule, individualized suspicion could be forgiven by utilizing that test for virtually any search or seizure, not just administrative searches.

In the case before it, the Court struck the balance by requiring individualized suspicion. The Court held that a search of a student by a teacher or other school official was justified when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[54] But the Court elaborated in a footnote that it was not deciding whether "individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities."[55] This reaffirmation that the balancing test could, in appropriate circumstances, authorize suspicionless searches, combined with Justice White's statement that the balancing test provided the appropriate analysis for assessing *any* Fourth Amendment conduct by the government, provided the basis for a broad expansion of the use of the balancing test and, by extension, the suspicionless search category.[56]

Justice Blackmun recognized the door had been opened to an expanded use of the reasonableness approach and tried to limit the expansion of the suspicionless search category.[57] In his concurring opinion, he asserted that the majority had "omit[ted] a crucial step" in freeing the government from the warrant approach.[58] He explained that the Court had used, and should only continue to use, the balancing test—the route to suspicionless searches—when confronted by "a special law enforcement need for greater flexibility."[59] Specifically, he stated, "*Only* in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[60]

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[51] *Id.* at 341.

[52] *Id.* at 337.

[53] *Id.* (quoting Camara v. Mun. Court of S.F., 387 U.S. 523, 536-37 (1967)).

[54] *Id.* at 342.

[55] *Id.* at 342 n.8.

[56] *See* Stephen J. Schulhofer, *On The Fourth Amendment Rights Of The Law-Abiding Public,* 1989 SUP. CT. REV. 87, 100.

Justice Blackmun's "special needs" rubric was applied once by a plurality of the Court in a case with similarities to a school search—a search of a government worker's desk for evidence related to work misconduct[61]—before being adopted by a majority of the Court in *Griffin v. Wisconsin*, a case which featured a search of a probationer's home based on reasonable suspicion.[62] In *Griffin*, after stating the rule that a search "usually" requires a warrant and probable cause, the Court stated that it had permitted exceptions to the rule "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[63]

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[57] *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment).

[58] *Id.*

[59] *Id.* (quoting Florida v. Royer, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)).

[60] *Id.* (emphasis added).

[61] *See* O'Connor v. Ortega, 480 U.S. 709, 725 (1987). Surprisingly, Justice Blackmun dissented in *Ortega*. However, his disagreement was not with the special needs rubric itself, but with, what he perceived as, the plurality's misapplication of it: "Because there was no 'special need' to dispense with the warrant and probable-cause requirements of the Fourth Amendment, I would evaluate the search by applying this traditional standard." *Id.* at 732 (Blackmun, J., dissenting) (internal citation omitted).

[62] 483 U.S. 868, 871 (1987).

[63] *Id.* at 873 (internal quotation marks omitted) ("Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), we have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'") (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring in judgment (internal citation omitted))).

The Court noted instances in which it had found "special needs"—*O'Connor v. Ortega* (the office search case) and *T.L.O.*—and referred to various administrative searches as an example where "for similar reasons" the usual rule had been forgiven.[64]

But after referring to administrative searches as similar to, but apparently separate from, special needs, the Court seemed to bring them within the special needs category when it concluded, "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."[65] That language suggested the Court was consolidating its "balancing test" cases under the rubric of "special needs." Reinforcing this idea was language in a case decided two weeks earlier, *New York v. Burger*, which involved a suspicionless inspection of an auto junkyard.[66] In this seemingly classic administrative search case, the Court characterized the search as a special needs search and justified permitting a suspicionless search because "as in other cases of 'special need' . . . a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment."[67]

At this point, courts and commentators were confused about when the balancing test could be used. Some thought there were two exceptions: the special needs exception and the administrative search exception.[68] Others thought there was one exception—special needs—which included administrative searches and other types of searches.[69] But at this point, no one was suggesting that the balancing test was the general rule for analyzing searches. And whether it was *the* exception or just merely one of several exceptions, there now clearly was an incentive for government officials to argue a particular search scheme was justified by "a special need beyond the normal need for law enforcement." And that is just what the government did.

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[64] *Id.*

[65] *Id.* at 873-74.

[66] 482 U.S. 691 (1987).

[67] *Id.* at 702.

[68] *See, e.g.*, Michael R. Beeman, Note, *Investigating Child Abuse: The Fourth Amendment and Investigatory Home Visits*, 89 COLUM. L. REV. 1034, 1048-49 (1989) (noting that special needs searches can be distinguished from administrative searches and criminal searches); The Harvard Law Review Association, *The Supreme Court, 1988 Term: Leading Cases*, 103 HARV. L. REV. 137, 269, 275 (1989) (explaining that "the Court constructed three tests to determine the reasonableness of a search or seizure": the warrant and probable cause requirements for searches in the criminal context; the reasonable suspicion requirement for searches in "exceptional circumstances," i.e., special needs searches; and no requirement of individualized suspicion for adminis-

D. The Rise of the "Special Needs" Exception

In a series of cases involving drug testing of school children and others in the late 1980s through the 1990s, the government urged the Court to uphold the search schemes as justified by special needs, and the Court embraced the exception.[70] In each case, the Court emphasized that searches generally needed to be supported by a warrant and probable cause, but relied on special needs as the justification for departing from the general rule and utilizing the balancing test.

In *Skinner v. Railway Labor Executives' Association*, a case challenging the suspicionless drug testing of railroad

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trative searches); Ronald F. Wright, Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1144 n.84 (1984) ("Administrative searches occupy their own exception to the warrant requirement.").

[69] *See, e.g.*, Captain Jeffrey D. Smith, *Administrative Inspections in the Armed Forces After* New York v. Burger, 1988 ARMY LAW. 9, 9 ("Administrative [searches] are authorized in a variety of situations and are justified when 'special need[], beyond the normal need for law enforcement, make the warrant and probable cause requirement impractica[ble].'").

[70] *See* Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (holding that school policy requiring all students who participated in competitive extracurricular activities submit to drug testing did not violate the Fourth Amendment); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (holding that random, suspicionless drug testing of school athletes does not violate the Fourth Amendment); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (holding that suspicionless and warrantless drug testing of Customs Agents is reasonable under the Fourth Amendment due to special needs beyond the normal need for law enforcement); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 634 (1989) (holding that alcohol and drug tests of railway workers are reasonable within the meaning of the Fourth Amendment "[even] in the absence of a warrant or reasonable suspicion," because "any particular employee may be impaired").

workers,[71] the Court acknowledged that "[e]xcept in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause."[72] But the Court went on to explain that it had "recognized exceptions to this rule . . . 'when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."'"[73] Similarly, in *National Treasury Employees Union v. Von Raab*, the companion case to *Skinner* involving drug testing of Customs Department employees,[74] the Court again acknowledged the general rule requiring a warrant and probable cause (or some other level of individual suspicion), but asserted that its cases "establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement," the Court may balance the interests de novo to determine whether a warrant or individual suspicion is required.[75]

The fact that the Court did not hedge its statements by characterizing special needs as simply one of many instances in which the Court had recognized an exception and freely cited to inventory cases,[76] traffic checkpoint cases,[77] and administrative search cases[78] as if all were within the umbrella of the special needs exception, suggested it had found a unifying principle for its suspicionless search jurisprudence.[79] Similarly, in assessing the drug testing scheme of student athletes in *Vernonia School District 47J v. Acton*,[80] the Court again referred to the special needs doctrine seemingly as *the* route to qualifying for an exception to the requirement of individualized suspicion when it stated that "a warrant is not required to establish the reasonableness of *all* government searches,"[81] and explained that a search unsupported by probable cause could be justified "when special needs, beyond the normal need for law enforcement, make the warrant probable-cause requirement impracticable."[82]

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[71] 489 U.S. at 606.

[72] *Id.* at 619.

[73] *Id.* (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

[74] 489 U.S. at 659.

[75] *Id.* at 665.

[76] *Id.* at 667-68 (citing South Dakota v. Opperman, 428 U.S. 364 (1976) and Colorado v. Bertine, 479 U.S. 367 (1987) (inventory search cases)).

[77] *Id.* at 665, 668, 672, 674 (citing United States v. Martinez-Fuerte, 482 U.S. 543 (1976) (traffic checkpoint case)).

[78] *Id.* at 665-66, 668, 671 (citing O'Connor v. Ortega, 480 U.S. 709 (1987), an administrative search case); *id.* at 668, 674-75 (citing Camara v. Mun. Court of S.F., 387 U.S. 523 (1967) (administrative search case)).

[79] *See id.* at 665-68.

[80] 515 U.S. 646 (1995).

The Court's rhetoric in these cases seemed to convince commentators that the special needs exception was the gateway to being able to utilize the balancing test (and possibly justify a suspicionless search).[83] But there were also hints from the Court that the special needs exception was not the single category of permissible suspicionless searches. In the midst of deciding the drug testing cases, the Court revisited traffic checkpoints in *Michigan Department of State Police v. Sitz*, a civil case challenging a highway sobriety checkpoint program instituted by the Michigan State Police.[84] The plaintiffs argued the balancing test was not the proper method of analysis to decide the case, relying on *Von Raab* to argue that unless the government demonstrated a special need "'beyond the normal need' for criminal law enforcement," probable cause or reasonable suspicion was required and a balancing analysis was inappropriate.[85] Rather than finding or even suggesting that such a special need was present, which seemed rather easy to do,

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[81] *Id.* at 653.

[82] *Id.* (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

[83] *See* Butterfoss, *supra* note 6, at 458-59 nn.207 & 211.

> The Court currently has developed a framework that consists of two steps. First, it decides whether to analyze an intrusion under the Warrant or Reasonableness Clause. The Court has struggled to find the proper fulcrum between the two clauses, but currently asks whether a "special governmental need" exists that justifies departure from the Warrant Clause.

Scott E. Sundby, *"Everyman" 's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1796 (1994); *see also* DRESSLER, *supra* note 46, at § 19.01, at 324 ("[The] 'special needs' exception . . . can plausibly subsume the [administrative search and traffic checkpoint] categories of cases.").

[84] 496 U.S. 444 (1990).

[85] *Id.* at 450.

Justice Rehnquist provided a curt and cryptic response to the argument:

> But it is perfectly plain from a reading of *Von Raab*, which cited and discussed with approval our earlier [traffic checkpoint] decision in *United States v. Martinez-Fuerte*, that it was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways. *Martinez-Fuerte*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas* are the relevant authorities here.[86]

That is a particularly worrisome statement by Justice Rehnquist. Because it would have been so easy to find a special need in *Sitz*—highway safety—one wonders what his purpose was in avoiding the special needs framework. Despite all the language in the drug testing cases, and the citations to and reliance on non-drug testing cases (including traffic checkpoints) as if all within the same "special needs" exception or category, this statement seems to suggest separate categories.

In later cases, it is again unclear from the Court's language whether "special needs" was the label for the "closely guarded category of permissible suspicionless searches" or whether it was just one of a number of exceptions under which suspicionless searches were permissible.[87] Despite the confusion about whether there was a single category labeled "special needs" or whether several categories existed, the important point is that in every case the Court reaffirmed the basic principle that suspicionless searches are permissible *only in limited circumstances*.[88] For instance, in *City of Indianapolis v. Edmond*, a case involving a traffic checkpoint utilizing drug sniffing dogs to detect drug smugglers,[89] Justice O'Connor reiterated the rule that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing,"[90] and then stated: "[W]e have recognized only limited circumstances in which the usual rule does not apply."[91] *Ed-*

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[86] *Id.* (internal citations omitted).

[87] Perhaps the most detailed effort to present a unified suspicionless search and seizure jurisprudence came from Justice Ginsburg in her opinion for the Court in *Chandler v. Miller*, 520 U.S. 305 (1997), a case involving drug testing of candidates for state-wide office in Georgia and the first case in which the Court struck down a government scheme of suspicionless searches. After explaining that the Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion," Justice Ginsburg acknowledged that searches conducted without individualized suspicion had been upheld "in *certain limited circumstances*." *Id.* at 308 (emphasis added) (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989)). She did not explicitly state how "certain limited circumstances" related to the "closely guarded category" and to "special needs," but she referenced the full spectrum of suspicionless searches the Court had upheld—drug testing of workers, immigration and sobriety checkpoints, and "administrative inspections in closely regulated businesses"—before explaining the Court was striking down the Georgia scheme because it "does not fit within the closely guarded category of constitutionally permissible suspicionless searches." *Id.* at 308-09. She initially did not mention "special needs." Howev-

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er, later in her opinion, as she began her analysis of the issues, she reiterated that "particularized exceptions to the main rule [of individualized suspicion] are sometimes warranted based on 'special needs, beyond the normal need for law enforcement.'" *Id.* at 313-14 (quoting Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989)). It is unclear whether Justice Ginsburg was using "special needs" interchangeably with the "limited circumstances" she had referred to earlier in her opinion.

In analyzing the drug-testing scheme before the Court, Justice Ginsburg relied exclusively on the special needs exception. *Chandler*, 520 U.S. at 317-18 ("Our guides remain *Skinner*, *Von Raab*, and *Vernonia*."). Chief Justice Rehnquist noted this attempt at a unifying theme in his dissent: "Today's opinion speaks of a 'closely guarded' class of permissible suspicionless searches [and seizures] which must be justified by a 'special need.'" *Id.* at 325. (Rehnquist, C.J., dissenting). He didn't agree or disagree with the notion of a single category or class; he disagreed with the meaning the Court gave to "special needs" as a demonstrated problem versus simply a government interest. *See id.*

[88] *E.g.*, O'Connor v. Ortega, 480 U.S. 709, 722 (1987) ("[A]lthough 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.'" (quoting New Jersey v. T.L.O., 489 U.S. 325, 340 (1985))); *see* United States v. Kincade, 379 F.3d 813, 853 (9th Cir. 2004) ("And whether one attempts to manufacture neat categories with clever names or groups them all into one large category of cases involving 'special needs,' the overriding lesson is clear: when the government wishes to search individuals in order to obtain evidence of ordinary criminal wrongdoing, some level of individualized suspicion is required.") (internal citations omitted).

[89] 531 U.S. 32, 34-35 (2000).

[90] *Id.* at 37.

[91] *Id.* As examples, Justice O'Connor specified "certain regimes of suspicionless searches where the program was designed to serve 'special needs, beyond the normal need for law enforcement'"; appropriately limited searches for "certain administrative purposes"; and brief, suspicionless seizures of motorists at fixed Border Patrol checkpoints and at sobriety checkpoints. *Id.* (internal citations omitted). Unlike Justice Ginsburg, who listed several "limited circumstances" (not including special needs) and then seemed to label the group as "special needs," Justice O'Connor demoted special

mond is best known for imposing a "primary purpose" test for roadblocks—their primary purpose cannot be "ordinary crime control"[92]—but for our purposes, the case is important because whether or not the "limited circumstances" to which it refers are all within one exception (special needs) or special needs is just one of the limited circumstances, the point remains: suspicionless searches are permissible *only in limited circumstances*.

This basic principle was reaffirmed in a later case, *Ferguson v. City of Charleston*, a case involving drug testing of pregnant women receiving prenatal care at a public hospital.[93] *Ferguson* continued the confusion between the "special needs as the label for limited circumstances" versus "special needs as one of the limited circumstances" by referring first to the "closely guarded category of constitutionally permissible suspicionless searches,"[94] and later to the "closely guarded category of special needs."[95] Again, however, despite the confusion, *Ferguson* reaffirms the basic principle that suspicionless searches are permissible *only in limited circumstances*.[96]

In light of the Court's consistent reaffirmation of the basic principle that suspicionless searches are permissible only in limited circumstances, it was rather shocking when the Court decided a pair of cases involving searches of probationers and parolees and declared that, contrary to all its prior declarations, suspicionless searches are in fact permissible not only in

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needs to one of the limited circumstances, seemingly substituting special needs for the drug testing cases included by Justice Ginsburg.

[92] *Id.* at 44.

[93] 532 U.S. 67 (2001).

[94] *Id.* at 77 ("[T]his case differs from the four previous cases in which we have considered whether comparable drug tests 'fit within the closely guarded category of constitutionally permissible suspicionless searches.'" (quoting Chandler v. Miller, 520 U.S. 305, 309 (1997))).

[95] *Id.* at 84 ("[T]his case simply does not fit within the closely guarded category of 'special needs.'").

[96] And I would argue, those limited circumstances at this point had been pretty well defined by the Court, as expressed by Justice O'Connor: special needs (drug testing, school searches, probation searches); appropriately limited administrative searches; and brief traffic checkpoints with a primary purpose other than ordinary crime control.

limited circumstances or when justified by a special need, but as a matter of "general Fourth Amendment principles."

II. NOT SO SPECIAL ANYMORE?

The first of the two probationer/parolee cases where the Court suggested a dramatic change in its suspicionless search jurisprudence was *United States v. Knights.*[97] *Knights* involved a warrantless search of a probationer's home.[98] It was not a "probation search" in the sense that it was to ensure compliance with conditions of probation. Rather, the searching officer was investigating several incidents of property damage to utility company property.[99] The officer investigated the property damage incidents in typical fashion including surveillance that practically confirmed the defendant's involvement, but thought a search of the defendant's home would be useful to his investigation.[100] Aware of the probation condition, the officer searched the home based on what all parties assumed was reasonable suspicion, but not probable cause, and without a warrant.[101] In essence, the officer's search was a typical search for evidence of a crime that took advantage of the probation condition, a fact the lower court relied on to rule the search illegal.[102] Even if the search could qualify as a "special needs" exception search, it seems vulnerable to a challenge because it was for "purposes of ordinary crime control," a purpose which the Court had deemed unlawful in *Edmond.*[103]

It is worth remembering at this point that the original special needs case—the case in which a majority of the Court adopted Justice Blackmun's terminology for the first time—was *Griffin v. Wisconsin*, which involved the search of a probationer's home.[104] In light of that fact, the defendant's argument, as described by Justice Rehnquist, that "a warrantless search of a probationer satisfies the Fourth Amendment only if it is just like the search at issue in *Griffin—i.e.*, a 'special needs' search conducted by a probation officer monitoring whether the probationer is complying with probation restrictions," seems fairly persuasive.[105] But it failed to persuade Justice Rehnquist:

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[97] 534 U.S. 112 (2001).

[98] *Id.* at 115.

[99] *Id.* at 114-15.

[100] *Id.* at 115.

[101] *Id.* at 115-16.

[102] *Id.* at 116. The district court granted Knights's motion to suppress "on the ground that the search was . . . 'investigatory' rather than 'probationary.'" *Id.* The Ninth Circuit Court of Appeals affirmed. *Id.*

[103] *See supra* note 92 and accompanying text (explaining that, in *Edmond*, the Court held that when the primary purpose is ordinary crime control, roadblocks do not fall within the special needs exception and thus violate the Fourth Amendment in the absence of another recognized exception).

> This dubious logic—that an opinion *upholding* the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it—runs contrary to *Griffin*'s express statement that its "special needs" holding made it "unnecessary to consider whether" warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment.[106]

Not only did Justice Rehnquist refuse to analyze the search as a special needs case, he also felt it unnecessary to decide whether Knights's consent to the probation conditions authorized the search.[107] In Justice Rehnquist's view (for a unanimous court no less) any special needs or consent analysis was unnecessary "because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance."[108]

The immediate impact on the case before the Court was that the officer's purpose became irrelevant and was no longer an obstacle to the constitutionality of the search. As Justice Rehnquist explained:

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[104] *See supra* notes 61-64 and accompanying text (explaining that a majority of the Court adopted Justice Blackmun's "special needs" rubric in Griffin v. Wisconsin, 483 U.S 868 (1987)).

[105] *Knights*, 534 U.S. at 117.

[106] *Id.* at 117-18 (quoting *Griffin*, 483 U.S. at 878, 880).

[107] *Id.* at 118 ("We need not decide whether Knights'[s] acceptance of the search condition constituted consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights, however, because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances' with the probation search condition being a salient circumstance." (internal citation omitted)).

[108] *Id.* (internal citation omitted).

> Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, there is no basis for examining official purpose. With the limited exception of some special needs and administrative search cases, "we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers."[109]

But the larger impact of the Court's adoption of its "general Fourth Amendment approach" to assess the search scheme at issue in *Knights* is to broaden considerably the individuals and groups that may be subjected to suspicionless searches.[110] Apparently ordinary citizens no longer can lay claim to the general rule requiring individualized suspicion unless the search falls within a closely guarded category or certain limited circumstances. "Ordinary Fourth Amendment analysis" apparently can justify suspicionless searches.[111] Of course, while ordinary citizens may be subjected to the same analysis, that does not mean the result will be the same. A "salient feature" (to use the Court's words) is missing: ordinary citizens are not on probation.[112] And being subject to probation conditions was a very salient circumstance under the "totality of the circumstances" according to the Court.[113] The Court held that the probation conditions "significantly diminished Knights'[s] reasonable expectation of privacy."[114] It expressly reserved the question whether the probation condition "so diminished, or completely eliminated, Knights'[s] reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment,"[115] but one does not have to be much of a cynic to believe such a holding was not far behind. Recall the Court's caution in *T.L.O.* that "[w]e do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities."[116] The answer, that individualized suspicion was not an essential element for searches by school authorities, was not long in coming.[117] Nor was it long in coming in the probationer/parolee case.[118]

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[109] *Id.* at 122 (quoting Whren v. United States, 517 U.S. 806, 813 (1996)) (citing City of Indianapolis v. Edmond, 531 U.S. 32, 45 (2000)).

[110] United States v. Kincade, 379 F.3d 813, 864 (9th Cir. 2004) (Reinhart, J., dissenting).

[111] Admittedly, the search at issue in *Knights* was not a suspicionless search, but that provides little comfort. First, the scheme under which the search was authorized by the State also permitted suspicionless searches, and second, the search in *T.L.O.* was based on reasonable suspicion, but soon led to suspicionless search schemes being upheld in schools utilizing the same analysis the Court used to justify the search at issue in *T.L.O.*

[112] *Kincade*, 379 F.3d at 835-36 (adopting the "ordinary Fourth Amendment totality of the circumstances" approach for convicted felons subject to DNA testing, but suggesting that the "general citizenry" would be treated differently).

[113] *Knights*, 534 U.S. at 120-21 (noting that the fact that probationers are "more likely than the ordinary citizen to violate the law" strengthens the State's general interest in "apprehending violators of the criminal law" in this case (citation omitted)).

Five years after *Knights*, the Court decided *Samson v. California*, a case involving the suspicionless search of a parolee on the street.[119] In *Samson*, the officer stopped the defendant because he thought Samson was subject to an outstanding warrant.[120] When that information proved incorrect, the officer searched him anyway because he was aware Samson was on parole and subject to parole conditions.[121] Justice Thomas started his analysis in the case by stating, "'[U]nder our general Fourth Amendment approach' we 'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment."[122] He explained, "Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"[123] Relying again on the salient circumstance of parole (which presents a lower expectation of privacy than even probation according to the Court[124]), the Court held, "Examining the totality of the circumstances pertaining to petitioner's status as a parolee, 'an established variation on imprisonment,' including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate."[125] There was some debate among the Justices whether that statement meant the Court had found that parolees—like prisoners—have *no* reasonable expectation of privacy and therefore no Fourth Amendment rights.[126] But for our purposes, the more important debate was the one concerning whether the Court could uphold a suspicionless search using "ordinary Fourth Amendment analysis" or whether it was required to find a special need and utilize the special needs exception analysis.[127]

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[114] *Id.* at 120.

[115] *Id.* at 120 n.6.

[116] New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985).

[117] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (explaining that while the school search approved in *T.L.O.* was based on individualized suspicion, the *T.L.O.* Court also "explicitly acknowledged" that "the Fourth Amendment imposes no irreducible requirement of such suspicion" (quoting *T.L.O.*, 469 U.S. at 342)). In fact, not only did the Court determine that suspicionless searches in schools were acceptable, but Justice Scalia asserted that "testing based on 'suspicion' of drug use would not be better, but worse." *Vernonia*, 515 U.S. at 663-64.

[118] *See* Samson v. California, 547 U.S. 843, 846 (2006) (holding that a suspicionless search of a parolee did not violate the Fourth Amendment); *see also* United States v. Kincade, 379 F.3d 813, 829 (9th Cir. 2004) (predicting that the application of *Knights* would not be limited to searches supported by individualized suspicion).

[119] *Samson*, 547 U.S. at 846-47.

[120] *Id.* at 846.

[121] *Id.* at 846-47.

In dissent, Justice Stevens insisted a finding of special need was required:

> [O]ur Fourth Amendment jurisprudence does not permit the conclusion, reached by the Court here for the first time, that a

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[122] *Id.* at 848 (alteration in original) (quoting United States v. Knights, 534 U.S. 112, 118 (2001)).

[123] *Id.* (quoting *Knights*, 534 U.S. at 118-19).

[124] *Id.* at 850.

[125] *Id.* at 852 (internal citation omitted).

[126] *Id.* at 850 n.2 ("Nor, as the dissent suggests, do we equate parolees with prisoners for the purpose of concluding that parolees, like prisoners, have no Fourth Amendment rights."); *id.* at 861-62 (Stevens, J., dissenting) ("[T]he Court two-steps its way through a faulty syllogism and, thus, avoids the application of Fourth Amendment principles altogether. The logic apparently is this: Prisoners have no legitimate expectation of privacy; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy.").

[127] *See infra* text accompanying notes 128-37.

> search supported by neither individualized suspicion nor "special needs" is nonetheless "reasonable."
>
> . . . While individualized suspicion "is not an 'irreducible' component of reasonableness" under the Fourth Amendment, the requirement has been dispensed with only when programmatic searches were required to meet a "'special need' . . . divorced from the State's general interest in law enforcement."[128]

And later in his opinion he declared, "Never before have we plunged below that floor absent a demonstration of 'special needs.'"[129]

Perhaps more important than whether the Court had abandoned its established approach to suspicionless searches was what was lost by not analyzing the case as a special needs case. Justice Stevens explained:

> In special needs cases we have at least insisted upon programmatic safeguards designed to ensure evenhandedness in application; if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor's unfettered discretion. Here, by contrast, there are no policies in place—no "standards, guidelines, or procedures,"—to rein in officers and furnish a bulwark against the arbitrary exercise of discretion that is the height of unreasonableness.[130]

Justice Stevens believed the requirement that the search not be for purposes of ordinary crime control made the search in *Samson* illegal, and he further believed that was the precise reason the majority avoided utilizing the special needs exception:

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[128] *Samson*, 547 U.S. at 858 (Stevens, J., dissenting) (internal citations omitted) (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000); Ferguson v. Charleston, 532 U.S. 67, 79 (2001)).

[129] *Id.* at 864.

[130] *Id.* at 860-61 (internal citations omitted) (quoting Delaware v. Prouse, 440 U.S. 648, 650 (1979)) (citing *Prouse*, 440 U.S. at 654-55; United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975)).

> Not surprisingly, the majority does not seek to justify the search of petitioner on "special needs" grounds. . . . *Griffin*, after all, involved a search *by a probation officer* that was supported by *reasonable suspicion*. The special role of probation officers was critical to the analysis . . . .
>
> It is no accident, then, that when we later [in *Knights*] upheld the search of a probationer *by a law enforcement officer* (again, based on reasonable suspicion), we forwent any reliance on the special needs doctrine.[131]

Justice Thomas responded to Justice Stevens's claim that the Court had broken new ground:

> That simply is not the case. . . . [W]hile this Court's jurisprudence has often recognized that "to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," we have also recognized that the "Fourth Amendment imposes no irreducible requirement of such suspicion." Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches, *we have never held that these are the only limited circumstances* in which searches absent individualized suspicion could be "reasonable" under the Fourth Amendment.[132]

The last statement by Justice Thomas seems a bit disingenuous. Although it is fair to say that when the Court says such searches are permissible *only in limited circumstances* the Court is free to add additional categories or circumstances, the statement certainly suggests that the route required to uphold new types of suspicionless searches is to add to the limited categories, not to simply abandon the "limited circumstances" rule and permit such searches under "general Fourth Amendment" analysis.

The likely result of the Court's shift to "general Fourth Amendment analysis" in suspicionless search cases is a much less constrained "balancing test" approach.[133] There will be less concern for whether "measures to protect against the state actor's unfettered discretion" are in place (which the dissent claims is an indispensable requirement of "special needs" searches),[134] and there will be no restriction against the primary purpose of the search being for law enforcement purposes. Justice Thomas believed "California's prohibition on 'arbitrary, capricious, or harassing' searches" addressed the first concern.[135] But the search of Samson seems pretty arbitrary. Samson was stopped and searched on the authority of an outstanding warrant, a warrant the officer discovered did not exist, but the officer searched him anyway.[136] Justice Thomas explained that "[u]nder California precedent, we note, an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee."[137] Of course, the lawfulness of a search of someone *not* on parol is not the issue; the issue is whether a search of a parolee is arbitrary, capricious, or harassing. Justice Thomas's opinion suggests a remarkably "hands off" approach to suspicionless searches, an activity that used to be considered an extraordinary action by government officials. Attempting to discern what this shift in the Court's suspicionless search jurisprudence means for children and the Fourth Amendment brings us to *Safford Unified School District #1 v. Redding.*[138]

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[131] *Id.* at 858-60.

[132] *Id.* at 855 n.4 (majority opinion) (emphasis added) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976)).

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[133] United States v. Kincade, 379 F.3d 813, 864 (9th Cir. 2004) (Reinhart, J., dissenting) ("The danger in the plurality's approach lies in its willingness to apply the totality of the circumstances test to uphold law enforcement searches where no suspicion at all exists. Under such an approach, all of us would inevitably have our liberty eroded when our privacy interests are balanced against the "monumental" interests of law enforcement.").

[134] *Samson*, 547 U.S. at 860 (Stevens, J., dissenting).

[135] *Id.* at 856.

[136] *Id.* at 846-47.

[137] *Id.* at 856 n.5 (citing People v. Sanders, 73 P.3d 496, 505-06 (Cal. 2003); Brief for United States as Amicus Curiae Supporting Respondent at 20, Samson v. California, 547 U.S. 843 (2006) (No. 04-9728)).

[138] 129 S. Ct. 2633 (2009).

III. SCHOOL SEARCHES: BACK TO THE FUTURE?

One of the most curious things about *Redding* is that the words "special need" do not appear in any of the opinions.[139] In contrast, those words appeared seven times in the majority opinion alone in *Earls*,[140] and another six times in Justice Ginsburg's dissent.[141] It seems unlikely that many commentators would have predicted prior to *Redding* that a school search case would be decided without using the term "special needs." Perhaps the term—and the exception—were not used because the case simply required a straightforward application of the seminal school search case, *T.L.O.*,[142] and a suspicionless search was not involved.[143] But the same could be said of *Knights*, the case involving a search of a probationer's home based on reasonable suspicion.[144] That case simply required a straight forward application of a seminal probationer's search case, *Griffin v. Wisconsin*,[145] and a suspicionless search was not involved.[146] Yet the Court in *Knights* at least addressed the special needs exception in order to eventually rule that it need not be applied in the case.

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[139] *Id.*

[140] Bd. of Educ. v. Earls, 536 U.S. 822, 827, 829, 835, 836 (2002).

[141] *Id.* at 843, 844, 854 (Ginsburg, J., dissenting).

[142] *Redding*, 129 S. Ct. at 2644 (Stevens, J., concurring in part and dissenting in part). Justice Stevens explained:

> In *New Jersey v. T.L.O.*, the Court established a two-step inquiry for determining the reasonableness of a school official's decision to search a student. First, the Court explained, the search must be "'justified at its inception'" by the presence of "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." Second, the search must be "permissible in its scope," which is achieved "when the measures adopted are reasonably related to the objectives of the search and *not excessively intrusive in light of the age and sex of the student and the nature of the infraction*."
>
> Nothing the Court decides today alters this basic framework. It simply applies *T.L.O.* to declare unconstitutional a strip search of a 13-year-old honors student that was based on a groundless suspicion that she might be hiding medicine in her underwear.

Id. (internal citations omitted).

[143] *Id.* at 2637 (majority opinion) ("The issue here is whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials *acting on reasonable suspicion* that she had brought forbidden prescription and over-the-counter drugs to school." (emphasis added)).

[144] United States v. Knights, 534 U.S. 112, 114 (2001) ("In this case, we decide whether a search pursuant to this probation condition, and *supported by reasonable suspicion*, satisfied the Fourth Amendment." (emphasis added)).

Could it be that the special needs exception so obviously does not apply in these situations that the parties do not even raise it? The United States as amicus in *Redding* raised the special needs exception for precisely that purpose, to distinguish the case from the special needs cases.[147] The United States argued that the special needs category applied only to searches "undertaken pursuant to a general program," not to targeted searches based on suspicion like the one at issue in *Redding*.[148] If that is true, and school searches can be analyzed without resorting to the special needs exception, under what analytical framework should they be analyzed? Perhaps the best hint comes from Justice Thomas, the author of the majority opinion in *Samson v. California*, who insisted in that case that the suspicionless search of a parolee could be decided under the Court's "general Fourth Amendment approach."[149] Justice Thomas and Justice Scalia recently have been advocating that Fourth Amendment analysis should begin by determining whether the search or seizure was legal or illegal under the common law at the time the Amendment was drafted.[150] Justice Scalia explained this approach in *Wyoming v. Houghton*, a case involving the scope of the automobile exception.[151] Specifically, the issue was "whether police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband."[152] In his majority opinion, Justice Scalia began his analysis of the constitutionality of the search by stating:

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[145] *See id.* at 118-19.

[146] *Id.* at 114.

[147] Brief for the United States as Amicus Curiae Supporting Reversal [Brief for United States] at 10-12, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479). The United States wrote:

> This Court has recognized that the public school context is unique for Fourth Amendment purposes. . . .
>
> The unique character of this context has resulted in two distinct Fourth Amendment frameworks. One framework, developed in *Vernonia* and *Earls*, applies to suspicionless searches that are conducted as part of a systematic drug testing program. As to those searches, the requirement of individualized suspicion is "impracticable" and therefore unnecessary; the Fourth Amendment inquiry instead turns on a balancing of the strength of the governmental interests furthered by the testing program against the intrusion on the subject's legitimate expectation of privacy. That standard is inapplicable here because the search of respondent was not undertaken pursuant to a general program.
>
> Because this case concerns a search based on individualized suspicion of wrongdoing, it is governed by the separate framework set forth in *New Jersey v. T.L.O.*

Id. (citing Bd. of Educ. v. Earls, 536 U.S. 822, 830-38 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654-64 (1995)).

[148] *Id.* at 11-12.

> In determining whether a particular government action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.[153]

Under this approach, the balancing test as a means of determining the reasonableness of a Fourth Amendment search or seizure takes a back seat to the common law at the time the Amendment was adopted.[154] Taken seriously, that approach would change dramatically the operation of the Fourth

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[149] 547 U.S. 843, 848 (2006).

[150] *See infra* note 151 and accompanying text.

[151] 526 U.S. 295 (1999). In support of this proposition, Justice Scalia cited Justice Thomas's majority opinion in *Wilson v. Arkansas*, 514 U.S. 927 (1995), which established that the "knock and announce" rule was of constitutional magnitude, based largely on the conclusion that this was the recognized rule "at the time of the framing." *Houghton*, 526 U.S. at 299 (citing *Wilson*, 514 U.S. at 934).

[152] *Houghton*, 526 U.S. at 297.

[153] *Id.* at 299-300 (citing *Wilson*, 514 U.S. at 931; California v. Hodari D., 499 U.S. 621, 624 (1991); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995)).

[154] *Houghton*, 526 U.S. at 299-300.

Amendment in schools, essentially eliminating the current protections the Amendment provides. Justice Thomas was quite clear about this in *Redding*.[155] In his concurring and dissenting opinion, he set forth what he seemingly envisions as a "general Fourth Amendment approach" as it relates to school searches:

> [T]he most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the complete restoration of the common-law doctrine of *in loco parentis*.
>
> "[I]n the early years of public schooling," courts applied the doctrine of *in loco parentis* to transfer to teachers the authority of a parent to "'command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.'" So empowered, schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms.[156]

And he was equally clear what this approach meant for the search at issue in *Redding*:

> If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand. There can be no doubt that a parent would have had the authority to conduct the search at issue in this case. Parents have "immunity from the strictures of the Fourth Amendment" when it comes to searches of a child or that child's belongings.[157]

In Justice Thomas's view, if parents and children want protection from rules or actions by school officials that they (and likely others) consider unreasonable, they need to look elsewhere than the Fourth Amendment for relief:

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[155] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2655-56 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) ("If the common-law view that parents delegate to teachers their authority to discipline and maintain order were to be applied in this case, the search of Redding would stand. . . . Parents have 'immunity from the strictures of the Fourth Amendment' when it comes to searches of a child or that child's belongings.").

[156] *Id.* at 2655 (internal citations omitted).

[157] *Id.* at 2656.

> Restoring the common-law doctrine of *in loco parentis* would not, however, leave public schools entirely free to impose any rule they choose. "If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move."[158]

He expressed a similar view concerning the role of *in loco parentis* in determining the First Amendment rights of students in *Morse v. Frederick*,[159] the well-known "Bong Hits for Jesus" case, where he also asserted, "At least nominally, this Court has continued to recognize the applicability of the *in loco parentis* doctrine to public schools."[160]

Of course, Justice Thomas stood alone in *Redding* and *Morse*, so perhaps school children are still secure in at least having some Fourth Amendment rights. But he is not alone in championing a return to *in loco parentis*. Justice Scalia "revived" *in loco parentis* in his opinion in *Vernonia*,[161] and Justice

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[158] *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 419 (2007) (Thomas, J., concurring)).

[159] *Morse*, 551 U.S. at 410 (Thomas, J., concurring).

[160] *Id.* at 416 n.6.

[161] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995). In *Vernonia*, Justice Scalia wrote:

> In *T.L.O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints. Such a view of things, we said, "is not entirely 'consonant with compulsory education laws,'" and is inconsistent with our prior decisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses. But while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T.L.O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," we have acknowledged that for many purposes "school authorities ac[t] *in loco parentis*," with the power and indeed

Breyer seemed warm to the idea in his concurring opinion in *Earls*.[162]

Following *Vernonia*, *in loco parentis*, although rejected in *T.L.O.*, began creeping back into play. In an article published shortly after *Vernonia*, Professor Martin Gardner, another participant in this symposium, quoted three other scholars to make this suggestion:

> Moreover, the *Acton* Court's recognition that "schoolmasters stand *in loco parentis*" to their students at least for "many purposes" signals that the Court is "struggling to empower

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> the duty to "inculcate the habits and manners of civility." Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," the nature of those rights is what is appropriate for children in school.

Id. (alterations in original) (internal citations omitted). Justice Scalia carefully noted that while *T.L.O.* officially renounced the applicability of *in loco parentis* in public schools, the Court, only one year later, described the duties of public schools as remarkably similar to typical parental duties. *Id.* Thus, while not expressly challenging *T.L.O.*'s assertion that *in loco parentis* is no longer appropriate in the public school context, Justice Scalia suggested that the issue may be more complex; he suggested that school officials may act *in loco parentis* in certain circumstances and may be traditional state actors in others. *See id.* By pointing out this potential ambiguity, Justice Scalia has created an opportunity for a future partial reinstatement of *in loco parentis*.

[162] Bd. of Educ. v. Earls, 536 U.S. 822, 840 (2002) (Breyer, J., concurring). Seven years after Justice Scalia noted a possible opportunity for the partial restoration of *in loco parentis*, Justice Breyer indicated modest support for such a move:

> Today's public expects its schools not simply to teach the fundamentals, but "to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services," all in a school environment that is safe and encourages learning. The law itself recognizes these responsibilities with the phrase *in loco parentis*—a phrase that draws its legal force primarily from the needs of younger students (who here are necessarily grouped together with older high school students) and which reflects, not that a child or adolescent lacks an interest in privacy, but that a child's or adolescent's school-related privacy interest, when compared to the privacy interests of an adult, has different dimensions. A public school system that fails adequately to carry out its responsibilities may well see parents send their children to private or parochial school instead—with help from the State.

Id. (internal citations omitted). Justice Breyer justifies his support for a return to *in loco parentis* by asserting that the doctrine means no more than that the Fourth Amendment rights of children in public schools are different than the rights of adults, or the rights of those same children outside the public school context. *See id.* Arguably, Justice Breyer slightly mischaracterizes the nature of *in loco parentis*, but, nonetheless, he demonstrates that he is certainly persuadable on the issue.

> school officials to effectively address rising threats to children" perhaps leading "down a path that promises to end the Fourth Amendment rights of students in public schools."[163]

Are we now heading down that path? Could a revival of *in loco parentis* result in an end to the Fourth Amendment rights of students in public schools? A few recent cases suggest it is a possibility and, at a minimum, demonstrate that the views of the few justices who have suggested *in loco parentis* still plays a role in school cases are influencing lower courts perhaps more than they should.

In *Lopera v. Town of Coventry*, a visiting boys soccer team was accused by football players of stealing iPods and cell phones from the locker room where several of the visiting players had used the bathroom prior to the game.[164] In response to these allegations made following the game, the coach of the visiting team searched the bags of the players and found no stolen items, but this failed to satisfy the football players or the adults and athletic director who had joined them at the visiting team's bus.[165] As the coach discussed the situation with the athletic director, four police officers arrived with sirens activated and "boxed in" the bus.[166] To appease the officers and the crowd, the coach "consented" to a search of his players' bags by the officers. A thorough search failed to turn up any of the missing items.[167]

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[163] Martin R. Gardner, *The Fourth Amendment and the Public Schools: Observations on an Unsettled State of Search and Seizure Law*, 36 CRIM. L. BULL. 373, 385 (2000) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995); Bill O'Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 BYU EDUC. & L.J. 71, 113; Jacqueline A. Stefkovich & Michael O'Brien, *Drug Testing of Students in Public Schools: Implications of* Vernonia School District v. Acton *for other Types of School-Related Drug Searches*, 113 EDUC. L. REP. 521, 538 (1996)).

[164] 652 F. Supp. 2d 203, 209 (D.R.I. 2009). Apparently, while inside, one of the visiting players noticed a security guard keeping an eye on them. *Id.*

[165] *Id.* ("When Coach Marchand exited the bus, the original group of twenty football players had grown to about fifty or sixty students and adults. The Coventry Athletic Director was also waiting. According to Coach Marchand, at this point the crowd was extremely vocal, shouting derogatory and racist remarks at his team and threatening not to disperse until the missing items were found.").

[166] *Id.* at 210.

[167] *Id.*

Later, members of the soccer team filed suit alleging, in part, that the officers violated their Fourth Amendment right to be free from unreasonable searches.[168] Defendants conceded that no reasonable suspicion existed to justify the searches, but argued no constitutional violation occurred because the coach consented to the search *in loco parentis.*[169] They claimed qualified immunity and argued that it was reasonable for the officers on the scene to believe the coach, acting *in loco parentis* over the players, had at least apparent authority to consent to a search.[170] The plaintiffs responded that it was well settled that the *in loco parentis* doctrine cannot justify the search of a student.[171] They acknowledged that at one time the law considered school officials as acting broadly *in loco parentis*, but argued that notion had become seriously outdated over the previous thirty years.[172]

The district court responded to the plaintiffs' argument by conceding that "[i]n *T.L.O.*, the Supreme Court appeared to soundly reject the doctrine of *in loco parentis* as a rationale to justify a search of a student,"[173] but explained that the Supreme Court later added confusion when, in *Vernonia*, it "referred to the powers school officials have over students as custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[174] And the district court cited *Redding* to note, "Recently, the Supreme Court passed up an opportunity to clarify whether the *in loco parentis* doctrine has any significance in school search cases."[175] The district court found it meaningful, however, that

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[168] *Id.* at 209, 211.

[169] *Id.* at 212.

[170] *Id.* at 212-13.

[171] *Id.* at 213.

[172] *Id.*

[173] *Id.* ("'In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985))).

[174] *Id.* at 213-14 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995)).

[175] *Id.* at 214 (quoting Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2637 (2009)).

Justice Thomas had urged the Supreme Court to adopt *in loco parentis* as the standard to govern all school search cases, but that the majority declined to address his suggestion.[176] That led the district court to conclude that, "[i]n light of the Supreme Court's silence on the issue and the rather clear language of *T.L.O.*, a persuasive argument could be made that the *in loco parentis* doctrine serves no purpose in cases involving the Fourth Amendment rights of public school students."[177]

Nevertheless, the court pointed to Justice Thomas's statement in *Morse v. Frederick* that "at least nominally the Supreme Court continues to recognize the applicability of the *in loco parentis* doctrine to public schools"[178] to ultimately rule that "based on the full record of commentary on the issue, this Court cannot conclude that [the notion that *in loco parentis* is outdated] was a clearly established principle of constitutional law in 2006."[179] The district court said that such a conclusion was "not possible without ignoring the Supreme Court's statements in *Vernonia* and *Frasier* [sic],"[180] and explained that a review of circuit court cases also failed to clarify the issue.[181]

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[176] *Id.* at 214 n.6 ("Justice Thomas's partial dissent urged the Court to adopt an *in loco parentis* standard to govern all school search cases, a point the majority declined to address."). The district court also noted that Justice Thomas "advocat[ed] for a '*return* to the common-law doctrine of *in loco parentis*' and a '*complete* restoration' of the doctrine." *Id.* at 214 n.6 (quoting *Redding*, 129 S. Ct. at 2646, 2655 (Thomas, J., concurring in the judgment in part and dissenting in part)).

[177] *Id.* at 214.

[178] *Id.* (citing Morse v. Frederick, 551 U.S. 393, 416 n.6 (2007) (Thomas, J., concurring)).

[179] *Id.* at 214.

[180] *Id.* This reference to *Frasier* [sic] was to *Bethel School District No. 403 v. Fraser*, which the *Vernonia* Court quoted for the proposition that "for many purposes school authorities act *in loco parentis* with the power and indeed the duty to inculcate the habits and manners of civility." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681, 684 (1986) (citation omitted)).

[181] *Lopera*, 652 F. Supp. 2d at 214. The district court cited nine cases from six different circuits offering some level of support for the viability of the *in loco parentis* doctrine. *Id.* at 214-15 (citing cases from the Fifth, Second, Third, First, Sixth, and Fourth Circuits). The Court contrasted this with a citation to a case from the Second Circuit stating that "'the Supreme Court has rejected the notion that public schools generally act *in loco parentis* in their dealings with students.'" *Id.* at 215 (quoting Tenenbaum v. Williams, 193 F.3d 581, 594 n.9 (2d Cir. 1999)).

According to the district court, "Courts have bandied about the phrase to such an extent that it is far from clear exactly what role the *in loco parentis* doctrine plays in a Fourth Amendment analysis, particularly in the specific factual context presented here."[182] In the end, the district court granted the defendants' motion for summary judgment on the basis of qualified immunity.[183] The court carefully explained in a footnote that it was not holding that the coach had the authority to consent by virtue of *in loco parentis* authority, but instead that "the case law on the limits of a school official's *in loco parentis* authority in the specific factual context of this case is not sufficiently clear so that a reasonable police officer would be on notice that searching players based on the consent of their coach is unconstitutional."[184] The district court further concluded that "[w]hat is clear, however, is that Fourth Amendment rights 'are different in public schools than elsewhere; [and] the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children.'"[185]

The result in *Lopera* suggests that at some level *in loco parentis* has vitality in the school search setting to justify searches (or at least grant qualified immunity to officials carrying out searches) that otherwise might be found unconstitutional. The possibility of additional searches being upheld as constitutional will be amplified if courts stop utilizing the special needs exception. This is so because despite early criticism that the special needs exception opened the door to searches being found constitutional, it now appears the special needs exception, in contrast to the Court's "general Fourth Amendment approach," has a limiting effect on the range of government conduct justified under the Fourth Amendment.

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[182] *Id.* at 215.

[183] *Id.* ("[I]t cannot be said that the law in 2006 was clearly established concerning whether a high school coach chaperoning his players during an away game could or could not consent to a search of his players by police *in loco parentis*. What is clear, however, is that Fourth Amendment rights 'are different in public schools than elsewhere; [and] the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children.' Therefore, because the law was not clearly established concerning Coach Marchand's authority to consent to the search, the Defendant officers were entitled to rely on the consent." (alteration in original) (quoting *Vernonia*, 515 U.S. at 656)).

[184] *Id.* at 215 n.7.

[185] *Id.* at 215 (alteration in original) (quoting *Vernonia*, 515 U.S. at 656).

An example of how application of the special needs exception can constrain a court from upholding a search is *Spencer v. City of Bay City*.[186] *Spencer* was a challenge to the constitutionality of a Bay City, Michigan ordinance that allowed police officers with reasonable suspicion to demand a breath test from individuals under age twenty-one without obtaining a search warrant.[187] The City defended the ordinance by asserting the special needs exception, contending that the main purposes of the ordinance were "to stem the pernicious trend of increased under-age drinking, and to protect the public from the damage that can be caused by young people under the influence of alcohol."[188] The district court agreed that a strong interest existed in preventing "'harms associated with the use of alcohol by persons lacking the maturity necessary to do so responsibly' and 'to reduce underage drinking and, by extension, the fatalities and serious injuries caused by teenage drunk driving,'"[189] but rejected the City's argument that the search was lawful under the special needs exception because it determined that the primary purpose of the search was to gather evidence to enforce criminal laws.[190]

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[186] 292 F. Supp. 2d 932 (E.D. Mich. 2003).

[187] *Id.* at 934.

[188] *Id.* at 941.

[189] *Id.* (quoting State v. Stark (*In re* Stark), 645 N.W.2d 340, 342 (Mich. Ct. App. 2002)).

[190] *Id.* at 941-42. To reach this conclusion, the district court compared the ordinance to *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and the municipal hospital's practice of conducting drug tests on urine samples of pregnant women at issue in that case. *Id.* at 942. In *Ferguson*, the hospital conducted the testing in an effort to identify pregnant women using illegal drugs and provide them with substance abuse treatment; however, the hospital also turned the results over to the police. *Ferguson*, 532 U.S. at 82. The Supreme Court determined that the primary purpose of the drug testing was ordinary law enforcement; thus, despite its additional acceptable purpose (identifying pregnant women in need of substance abuse treatment), the testing violated the Fourth Amendment and was not saved by the special needs exception. *Id.* at 82-84. In making its comparison, the *Spencer* Court explained that, "[even though] there may also be another purpose behind the law [reducing under-age drinking], which might be characterized as a 'special need,' [that purpose] does not shelter the ordinance from demands of the Fourth Amendment's warrant requirement." *Spencer*, 292 F. Supp. 2d at 941-42.

Arguably, had the Court been free to apply an "ordinary Fourth Amendment approach," it might have found that the significant government interest it was willing to recognize—that of preventing "harms associated with the use of alcohol by persons lacking the maturity necessary to do so responsibly" and "reduc[ing] underage drinking and, by extension, the fatalities and serious injuries caused by teenage drunk driving"[191]—outweighed the intrusion on underage individuals under the statutory scheme. But the court felt constrained under the special needs exception precedent (in particular *Ferguson v. City of Charleston*) to find the scheme unconstitutional.[192]

Confusion about the Supreme Court's approach to suspicionless searches—whether to apply special needs analysis or general Fourth Amendment analysis—is also evident in the DNA sample cases. Courts are so confused about which test to apply that some are applying both. A recent example is *Friedman v. Boucher*,[193] a case in which a DNA swab was taken from a pretrial detainee in hopes of solving a cold case.[194] The detainee was a prior sex offender, but at the time of the pretrial detention in question on unrelated charges, he was under no restrictions or conditions from his prior sex offense conviction.[195] He brought suit alleging the forcible taking of his DNA violated his Fourth Amendment right to be free from unreasonable searches.[196] The district court granted summary judgment in favor of the government officials on the basis of qualified immunity.[197]

The Ninth Circuit held the dismissal of the lawsuit was improper, ruling that the suspicionless search of the detainee could not be upheld under the special needs exception because the purpose was "law enforcement."[198] Although in the majority's view the search was improper under the special needs exception due to its law enforcement purpose, the majority addressed the possibility that the search might be justified under the general Fourth Amendment approach, ultimately rejecting that argument as well because it determined the *Samson* case could not be used as precedent to uphold a search of a pretrial detainee rather than a parolee.[199]

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[191] *Spencer*, 292 F. Supp. 2d at 941 (quoting *Stark*, 645 N.W.2d at 342).

[192] *See supra* notes 190-91 and accompanying text.

[193] 580 F.3d 847 (9th Cir. 2009).

[194] *Id.* at 850-51. Taking the swab apparently did not result in the detainee being implicated in any cold case. *Id.* at 851-52.

[195] *Id.* at 851.

[196] *Id.* at 852.

[197] *Id.* at 851.

The dissenting judge would have affirmed the district court and dismissed the case by finding qualified immunity utilizing a "general Fourth Amendment approach."[200] Under that approach, the law enforcement purpose did not prevent the search from being lawful, and the lower expectation of privacy of a pretrial detainee meant the search was (at least arguably) permissible under the balancing test or totality of the circumstances test.[201]

The result reached by the dissent suggests a scenario where a search that is unconstitutional under the special needs exception is nevertheless permissible under general Fourth Amendment analysis. That seems backwards. The Court's suspicionless search jurisprudence began with the Court trying to determine which searches that would be unconstitutional under traditional Fourth Amendment analysis (the warrant approach) might nevertheless be permissible because they came within a closely guarded category (including special needs) allowing the Court to forgive the usual requirement of individualized suspicion.[202] Now, we seem to be in a strange place where the special needs exception has the opposite effect: being within the special needs exception may prevent a search from being upheld rather than having its original effect of permitting the Court to find an otherwise impermissible search justified.

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[198] *Id.* at 853 ("The 'special needs' exception is limited to 'important non-law enforcement purposes.' The only government interest asserted by Nevada in taking Friedman's DNA was to help solve 'cold cases.' Solving crimes is clearly a normal law enforcement function. Because the 'special needs' exception applies only to non-law enforcement purposes, and the State's interest here is the use of data for purely law enforcement purposes, the 'special needs' exception is inapplicable." (quoting United States v. Kincade, 379 F.3d 813, 823 (9th Cir. 2004))).

[199] *Id.* at 857-58.

[200] *Id.* at 862, 866 (Callahan, J., dissenting).

[201] *Id.* at 864-65.

[202] *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 720 (1987) ("[I]t is settled . . . that except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search war-

IV. WHERE ARE WE NOW?

The Court needs to delineate when it is appropriate to simply use "general Fourth Amendment" analysis to analyze suspicionless search cases and to clarify the reach of the special needs exception and the necessity of finding a special need (or other limited circumstance) to justify a suspicionless search. Guidance as to exactly what "general Fourth Amendment" analysis constitutes also would be helpful.[203] The door appears to be open to finding the school setting no longer demands the application of the special needs exception, but permits suspicionless searches by school officials to be upheld under the Court's new "general Fourth Amendment approach."[204] That, in turn, frees the Court from some of the limits of that excep-

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rant. . . . In particular, a warrant requirement is not appropriate when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. Or . . . [o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." (internal citations omitted)); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) ("Except in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. . . . When faced with . . . special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context."); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665-66 (1989) ("[A] search must be supported, as a general matter, by a warrant issued upon probable cause . . . . [W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.").

[203] The only guidance the Court has offered so far has been to equate "general Fourth Amendment" analysis with the totality of the circumstances test. For a discussion of the inappropriateness of using the totality of the circumstances test in this setting, see United States v. Kincade, 379 F.3d 813, 862 (9th Cir. 2004) (Reinhart, J., dissenting).

[204] *See supra* notes 147-48 and accompanying text (discussing that the special needs exception may only apply to suspicionless searches conducted pursuant to a general program and not to *T.L.O.*-type searches based on individualized suspicion).

tion—e.g. the primary purpose test[205] and demonstrating a significant need[206]—and may lead to suspicionless searches that currently may seem impermissible being upheld as constitutional.

Civil libertarians used to, and still do, lament the "standardlessness" of the special needs exception[207] and the lack of protection it provides.[208] Few would have speculated that the exception would ultimately protect us from something worse. This article suggests the special needs exception may have a second career as a constraint on government actions that implicate the Fourth Amendment. More likely, however, the exception will fade in importance as government activity that constitutes a search is upheld under the standardless and amorphous "general Fourth Amendment analysis." It will not be surprising to discover that all of us, not just school children and parolees, are not so special anymore.

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[205] City of Indianapolis v. Edmond, 531 U.S 32, 48 (2000) (holding that because a checkpoint program's primary purpose was "indistinguishable from the general interest in crime control," the checkpoints constituted a violation of the Fourth Amendment).

[206] *Von Raab*, 489 U.S. at 665 (explaining that the warrant and probable cause requirements can be excused as long as there is a showing of special governmental needs beyond the normal needs of law enforcement).

[207] *See, e.g.*, Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 109 (2005) ("When considered as a whole . . . the Court's special needs cases do not provide an overarching theory that clearly identifies which searches will satisfy the Court's constitutional scrutiny."); George M. Dery III, *Are Politicians More Deserving of Privacy than Schoolchildren? How* Chandler v. Miller *Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 74 (1998) ("[I]n the surreal world of special needs, any fact can be twisted to fit the desired result without regard for Fourth Amendment mainstays."); Michael S. Vaughn & Rolando V. del Carmen, *"Special Needs" in Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. C.R. L.J. 203, 220 (1993) ("The 'special needs' exception is virtually without standards, hence lower courts can fashion an endless stream of exceptions under the guise of 'special needs.'").

[208] *See, e.g.*, Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 531 (1997) ("The special needs rationale is making it remarkably easy for the state to bypass the rigorous requirements of a warrant and probable cause in a large and growing number of contexts."); Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 90 (1992) ("[U]nless the Supreme Court realigns its Fourth Amendment jurisprudence to parallel the historical intent of the Fourth Amendment, citizens' Fourth Amendment privacy protections will be subject to methodical erosion.").

T.L.O AND *REDDING'S* UNANSWERED (MISANSWERED) FOURTH AMENDMENT QUESTIONS: FEW RIGHTS AND FEWER REMEDIES

Barry C. Feld[*]

Compulsory attendance laws concentrate large groups of young people in schools. Crime rates increase sharply during adolescence and pose unique problems of social control in schools. In addition to their educational mission, school officials have to maintain order, provide a safe environment in which to learn, and control guns, drugs, and violence on campus and nearby. To do so, they impose extensive rules and regulations, physically monitor students, and generate more opportunities to infringe on Fourth Amendment interests than adults or youths encounter in other public places. School officials search students, their purses, jackets, backpacks, lockers, urine, and cars with great regularity. School resource officers (SROs), police, and their canine partners sometimes accompany school personnel who conduct searches. When courts define students' Fourth Amendment expectations of privacy, should they subject students to a different regime than adults or youths on the street enjoy? And what remedies may students invoke when school officials violate their rights?

Prior to the Supreme Court's ruling in *New Jersey v. T.L.O.*, school officials advocated and courts developed several rationales to uphold virtually all searches of students and their personal effects. Using inconsistent logic, school administrators sometimes argued that they acted as private citizens, hence their searches entailed no state action. In the alternative, they claimed to act *in loco parentis* under delegated authority from students' parents, argued students impliedly consented, or asserted their authority to provide third-party consent to search. More fundamentally, administrators insisted that public schools' security needs required more relaxed rules to search students.[1]

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The Supreme Court in *New Jersey v. T.L.O.* applied a Fourth Amendment standard of reasonableness, balanced the government's special need to intervene against intrusions on students' legitimate expectations of privacy, and held that the search in question was reasonable.[2] By finding that no Fourth Amendment violation occurred, the Court avoided answering the question for which it originally agreed to hear the case: "whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers."[3]

T.L.O. departed from ordinary Fourth Amendment principles and instead used a reasonableness balancing approach to analyze searches conducted by school officials. Moreover, the Court left unanswered many more questions than it answered. Because *T.L.O.* upheld the search under an amorphous reasonableness standard,[4] the Court provided no guidance for schools or courts to define valid searches in other circumstances. The Court did not decide whether the exclusionary rule applied to evidence obtained from unconstitutional searches conducted by school authorities. Because the procedural rights of delinquents and criminal defendants differ substantially,[5] the Court has never directly required an exclusionary remedy in delinquency prosecutions. In addition, *T.L.O.* avoided deciding what remedy, if any, students enjoyed in school disciplinary proceedings when school personnel obtain evidence unlawfully.[6]

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[1] *See* Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2646 (2009) (Thomas, J., dissenting) (advocating return to "common-law doctrine of in loco parentis under which 'the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order'" (quoting Morse v. Frederick, 551 U.S. 393, 414 (2007) (Thomas, J., concurring in part and dissenting in part))); New Jersey v. T.L.O., 469 U.S. 325, 332 n.2 (1985) (describing alternative search rationale); Richard Jenkins, *An Historical Approach to Search and Seizure in Public Education*, 30 W. ST. U. L. REV. 105 (2003) (providing a comprehensive analysis of pre-*T.L.O.* lower court decisions); Dale Edward F.T. Zane, Note, *School Searches Under the Fourth Amendment:* New Jersey v. T.L.O., 72 CORNELL L. REV. 368, 376-80 (1987) (analyzing alternative theories under which courts upheld student searches prior to *T.L.O.*). *See generally* William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974), for analyses of pre-*T.L.O.* cases.

[2] 469 U.S. at 333-48.

[3] *Id.* at 331.

T.L.O. went out of its way to identify other issues that the Court did not decide. Because *T.L.O.* involved the search of a student's purse in her possession, the Court specifically did not decide students' expectations of privacy in desks and lockers,[7] or in their cars parked on school property. The principal who searched T.L.O.'s purse acted alone and the Court did not decide which search standard—reasonable suspicion or probable cause—applied when police act in conjunction with school officials.[8] *T.L.O.* concluded that the principal who searched her had reasonable suspicion, and it declined to speculate whether staff could conduct reasonable searches without individualized suspicion.[9] Finding answers to these and related questions became more urgent with the increase in drug use and youth violence in the first decade after *T.L.O.* and the spate of school shootings and heightened police security in the subsequent decade.[10]

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[4] *Id.* at 381 (Stevens, J., concurring in part and dissenting in part) ("The Court's effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults' privacy only creates uncertainty in the extent of its resolve to prohibit the latter.").

[5] *Compare* Duncan v. Louisiana, 391 U.S. 145, 147-59 (1968) (holding that in all criminal prosecutions for serious offenses the Sixth Amendment right to a jury trial is made obligatory on the States by the Fourteenth Amendment), *and* Gideon v. Wainwright, 372 U.S. 335, 339-46 (1963) (holding that in all criminal prosecutions the Sixth Amendment right to counsel is made obligatory on the States by the Fourteenth Amendment), *with* McKeiver v. Pennsylvania, 403 U.S. 528, 543-52 (1971) (denying delinquents a constitutional right to jury trial), *and In re* Gault, 387 U.S. 1, 34-43 (1967) (basing juveniles' right to counsel on the Fourteenth Amendment due process clause rather than the Sixth Amendment). *See generally* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111 (2003) (arguing that the procedural deficiencies of juvenile court cannot sustain the use of delinquency convictions to enhance adult criminal sentences).

[6] *T.L.O.*, 469 U.S. at 333 n.3.

[7] *Id.* at 337 n.5.

[8] *Id.* at 341 n.7.

This article examines how the Supreme Court, federal and state courts, legislatures, and schools have answered these questions over the ensuing quarter-century. Part I A. analyzes *T.L.O.* and the Fourth Amendment questions that the Court *did* answer. *T.L.O.* applied Fourth Amendment strictures to school officials and balanced governmental and privacy interests. For a search to be reasonable, it must be justified at its inception—ordinarily individualized suspicion—and related in scope to that justification—degree of intrusiveness. I criticize *T.L.O.* for abandoning elementary Fourth Amendment principles—probable cause as a prerequisite to intrusive searches—and instead adopting a formless reasonableness standard that provides minimal guidance to school officials or lower courts confronted with the myriad factual variations of searches. Part I B. examines *Safford Unified School District #1 v. Redding*[11] which applied *T.L.O.*'s reasonableness balancing approach to a student's strip search, found the administrators acted unconstitutionally, and still denied relief. Part I C. identifies the questions *T.L.O.* declined to answer and to which *Redding* provides no additional guidance.

Part II analyzes how courts, legislatures, and school districts have responded to *T.L.O.*'s undecided questions. Part II A. examines juveniles' right to an exclusionary remedy in delinquency prosecutions and in internal school disciplinary proceedings. It identifies for later analyses the problematic issue of remedies when school officials violate students' constitutional rights. Part II B. examines how the increased presence of police officers in schools—police liaison officers or school resource officers—greatly complicates the question of "assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement."[12] It suggests that a weakened search standard and a heightened police presence fuels the school-to-prison pipeline and contributes to disproportionate minority over-representation in the juvenile justice system.

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[9] *Id.* at 342 n.8.

[10] *See generally* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (1999) (analyzing factors contributing to escalation in drug use, gun violence, and youth homicide between mid-1980s and mid-1990s); KATHERINE S. NEWMAN ET AL., RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS (2004) (analyzing social context of school shootings in the 1990s).

[11] 129 S. Ct. 2633 (2009).

Part III examines *T.L.O.*'s first prong that requires searches to be justified at their inception. Individualized suspicion, probable cause or reasonable suspicion, typically provides the bases to conduct searches reasonably. Part III A. examines applications of *T.L.O.*'s reasonable suspicion standard in schools. What quanta of facts provide a minimum basis for reasonable suspicion? Part III B. analyzes how school officials obtain information. *Redding* and other cases pose questions of how courts should evaluate tips provided by student informants. It examines the uses of metal detectors and dogs to provide bases to conduct intrusive searches. Part III C. analyzes post-*T.L.O.* drug-testing cases—*Acton*[13] and *Earls*[14]—in which the Court entirely abandoned Fourth Amendment jurisprudence, eschewed particularized facts, and upheld suspicionless searches.

Part IV examines *T.L.O.*'s second prong that limits the scope of searches to their threshold justification. It considers the scope of searches in different contexts. Part IV A. examines searches of lockers, desks, and personal effects. Part IV B. considers searches of students' automobiles on campus. Part IV C. focuses on strip searches and the Court's application of *T.L.O.*'s reasonableness standard in *Redding*.[15] Even though *Redding* found that school officials violated the Constitution, it provided no remedy.

Part V considers remedies available to students when school officials violate their Fourth Amendment rights. Cases present themselves in two procedural postures: a motion to suppress evidence in a delinquency prosecution or a § 1983 action for violations of constitutional rights. Neither of these remedies adequately protects students' rights or impels school officials to respect them. The Court's amorphous reasonableness balancing approach, the minimal threshold of suspicion to justify a search, the breadth of good-faith qualified immunity, judges' highly deferential stance toward school officials, and practical procedural impediments to litigation have created "enclaves of totalitarianism" that the Court has long decried.[16] The article concludes that students have few Fourth Amendment rights and fewer remedies for their violations.

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[12] *T.L.O.*, 469 U.S. at 341 n.7.

[13] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[14] Earls v. Bd. of Educ., 242 F.3d 1264 (10th Cir. 2001).

[15] *Redding*, 129 S. Ct. 2633.

PART I. *T.L.O.*'S REASONABLENESS BALANCING FRAMEWORK: FOURTH AMENDMENT FORM WITHOUT SUBSTANCE

The Supreme Court in *New Jersey v. T.L.O.* originally granted certiorari to consider whether juveniles could invoke the exclusionary rule in delinquency trials as a remedy for unconstitutional searches conducted by public school officials.[17] On reconsideration, the Court instead announced a Fourth Amendment reasonableness standard to govern school searches, concluded that the principal's search did not violate the Fourth Amendment, and did not reach the question of remedy. This section analyzes *T.L.O.*'s reasonableness standard, the Court's application of it in *Redding* to a strip search, and the many questions *T.L.O.* declined to answer.

A. New Jersey v. T.L.O.*: The Wrong Answer to a Question Not Asked*

A teacher discovered T.L.O., a 14–year–old high school freshman, and another girl smoking in a bathroom in violation of a school rule that prohibited them from smoking except in designated areas.[18] Reflecting an earlier attitude toward teen smoking, the school rules did not prohibit students from possessing or smoking cigarettes, but regulated only the places in which they could smoke.[19] The teacher who observed the violation brought the two girls to Vice Principal Theodore Choplick's office.[20] Although T.L.O.'s companion admitted her transgression, T.L.O. denied the charge and claimed that she did not smoke.[21] Choplick directed T.L.O. to his private office and demanded to see her purse.[22] He opened the purse, removed a pack of cigarettes, and confronted her with it for lying to him.[23] As he removed the cigarettes, he saw a pack of cigarette rolling papers which he associated with marijuana use.[24] Based on that suspicion, he conducted a thorough search of the purse which yielded a small amount of marijuana, a pipe, empty plastic bags, a quantity of money in one-dollar bills, a list of students who owed T.L.O. money, and two incriminating letters.[25] Choplick gave the evidence to the police.[26] When police interrogated T.L.O. and confronted her with the evidence, she confessed to selling marijuana at school.[27] In addition to sanctions imposed by the school, the State charged her with delinquency based on the evidence seized from her purse.[28] T.L.O. moved to suppress the evidence and her confession which she claimed the unlawful search tainted.[29] The juvenile court denied T.L.O.'s motion to suppress, adjudicated her delinquent, and placed her on probation for one year.[30] T.L.O. appealed the trial court's evidentiary ruling and the New Jersey Supreme Court reversed the judgment and ordered suppression of the evidence.[31]

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[16] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (upholding students' First Amendment rights in school); *see also* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (prohibiting school officials from compelling Jehovah's Witness students to salute the flag).

[17] 469 U.S. at 327.

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[18] *Id.* at 328.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 329.

[28] *Id.* at 329 n.1 (noting that T.L.O. received a 3–day suspension from school for smoking in a non-smoking area and a 7–day suspension for possession of marijuana). The trial court ruled that Choplick's search violated the Fourth Amendment, set aside the 7–day suspension, and the school did not appeal the decision. *Id.*

[29] *Id.*

[30] *Id.* at 333.

The New Jersey Supreme Court in *In re T.L.O.* considered two issues: "(1) whether the Fourth Amendment exclusionary rule applies to student searches made by public school administrators; and (2) what standard determines the reasonableness of the search if the exclusionary rule does apply."[32] The court concluded that the Fourth Amendment applied to searches conducted by public school officials.[33] It rejected the state's objection to an exclusionary remedy and held that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings."[34] Although the New Jersey Supreme Court dispensed with a warrant requirement, it insisted that school officials must have "reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order."[35] It did not specify whether "reasonable grounds" meant probable cause or only reasonable suspicion. The court reviewed the factual predicate for Choplick's search and concluded that he acted without adequate justification under either standard.[36] The contents of T.L.O.'s purse had no relevance to the teacher's accusation that she smoked in the bathroom—a violation only because it was a prohibited place to smoke—and Choplick lacked specific facts to believe it contained any contraband.[37] Therefore, his intrusive search that yielded evidence of drug crimes was invalid.

The United States Supreme Court initially granted New Jersey's petition for certiorari to consider "only the question whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers."[38] The Court set the case for re-argument to consider the applicability and scope of the Fourth Amendment to searches conducted by school officials.[39] Because a majority of the Court concluded that Choplick's search of T.L.O.'s purse did not violate the Fourth Amendment, it did *not* answer the question whether juveniles could invoke the exclusionary rule in delinquency proceedings for unlawful searches by school officials.[40]

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[31] *Id.*

[32] T.L.O. v. Engerud (*In re* Interest of T.L.O.), 463 A.2d 934, 936 (N.J. 1983).

[33] *Id.* at 942.

[34] *Id.* at 939.

[35] *Id.* at 941.

[36] *Id.* at 942.

[37] *Id.* ("[Choplick] did not have reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that would seriously interfere with school discipline or order. . . . Mere possession of cigarettes did not violate school rule or policy, since the school allowed smoking in designated areas. The contents of the handbag had no direct bearing on the infraction.").

All of the *T.L.O.* Justices agreed that public school officials are state actors bound by the Fourth Amendment's prohibition against unreasonable searches and seizures.[41] But that conclusion required the Court to define the scope of searches conducted by school officials:

> Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.[42]

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[38] New Jersey v. T.L.O., 469 U.S. 325, 331 (1985).

[39] *Id.* at 332.

[40] *Id.* at 333 n.3 ("[W]e do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities. The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation. Neither question is logically antecedent to the other, for a negative answer to either question is sufficient to dispose of the case. Thus, *our determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule.*" (emphasis added)).

[41] *Id.* at 335-38.

[42] *Id.* at 337 (citation omitted).

The Court used the reasonableness analysis developed in *Terry v. Ohio*[43] and balanced the intrusion on a person's expectation of privacy against the government's need to intervene.

The Court rejected the state's argument that because of schools' pervasive regulation of students, young people had no reasonable expectation of privacy in personal items, such as purses, brought to school.[44] It repudiated the state's analogy of schools to prisons and the claim that officials' need to maintain order and discipline vitiated students' legitimate expectations of privacy.[45] The Court observed that students necessarily bring personal property—supplies, wallets, purses, backpacks, musical instruments, and other articles to participate in recreational and extracurricular activities—to school and concluded that they have not "waived all rights to privacy in such items merely by bringing them onto school grounds."[46] Respecting students' privacy interests fosters their maturation and sense of autonomy and socializes them into the values of a democratic society, whereas arbitrary governmental invasions may impede development and cause psychological harms.[47]

Although the majority grudgingly acknowledged T.L.O.'s privacy interests in her purse, it balanced those abstract concerns against school officials' imperative to maintain discipline and order and to promote an appropriate educational environment.[48] The Court noted that the increased prevalence of drugs and violence posed great challenges for some school administrators. Thus, schools had "special needs" beyond those associated with traditional law enforcement.[49] To address those evils and to provide a suitable academic milieu required school officials to closely supervise students and allowed them to impose rules and regulations which would not apply to adults or to youths in other settings.[50] Moreover, the Court emphasized that school officials require flexibility to achieve these goals.[51]

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[43] 392 U.S. 1 (1967) (upholding police "stop and frisk" practices as less intrusive than full-blown searches and therefore requiring only "reasonable suspicion" rather than probable cause).

[44] The state's argument found a more sympathetic audience in the concurring opinion of Justices Powell and O'Connor. "In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). They also distinguished the relationship between teachers and students from those of law enforcement officers and citizens. *Id.* at 349. "Law enforcement officers function as adversaries of criminal suspects. . . . Rarely does this type of adversarial relationship exist between school authorities and pupils." *Id.* at 349-50.

[45] *Id.* at 338-39 (majority opinion) (noting that because of the need to maintain order in prison, inmates retain no legitimate expectations of privacy: "We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.").

[46] *Id.* at 339.

[47] *See generally* Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 902-04 (1988) (describing injuries associated with unjustified invasions of young people's privacy).

The majority, concurring, and dissenting Justices agreed that the Fourth Amendment applied to searches conducted by school officials and that exigent circumstances justified dispensing with a warrant as a prerequisite to a valid search.[52] However, the majority and dissent disagreed about the level of suspicion required to justify an intrusive search. The majority conceded that even a warrantless search ordinarily required probable cause, but it insisted that probable cause was not "an irreducible requirement of a valid search."[53] Instead of adhering to the language of the Fourth Amendment, the Court engaged in "a careful balancing of governmental and private interests" and concluded that "the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause."[54]

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[48] *T.L.O.*, 469 U.S. at 339-40.

[49] Although the *T.L.O.* majority emphasized officials' obligation to maintain order, Justice Blackmun's concurring opinion focused on schools' "special needs" beyond those associated with ordinary law enforcement to justify dispensing with the probable cause requirement. *Id.* at 352-53 (Blackmun, J., concurring).

> The elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers. . . . [B]ecause drug use and possession of weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.

Id.

[50] *Id.* at 339 (majority opinion).

[51] *Id.* at 340 ("[M]aintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.").

[52] *Id.* ("[S]chool officials need not obtain a warrant before searching a student who is under their authority"); *id.* at 355-56 (Brennan, J., concurring in part and dissenting in part) (agreeing that school officials "generally may conduct a search of their students' belongings without first obtaining a warrant"); *id.* at 370-71 (Stevens, J., concurring in part and dissenting in part).

[53] *Id.* at 340 (majority opinion).

The Court used a balancing approach similar to that used in *Terry v. Ohio*[55] to justify stop-and-frisk intrusions to govern the reasonableness of school searches. "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was *justified at its inception*'; second, one must determine whether the search as actually conducted 'was *reasonably related in scope* to the circumstances which justified the interference in the first place.'"[56] A search would be justified at its inception if school officials had reasonable grounds to believe that it would uncover evidence of a crime or a violation of a school rule.[57] A search would be reasonably related in scope as long as officials confined it to the objectives of the search and did not use excessively intrusive methods "in light of the *age and sex* of the student and the *nature of the infraction*."[58] However, the Court did not explain the practical meaning of those limitations—age, sex, or the nature of the infraction. Nor did it explain why a male principal conducting a full-blown search of a young female's purse for a violation—smoking in the wrong venue—that did not require additional evidence did not exceed the scope limitation it purported to announce.[59]

T.L.O. used the same standard as that employed by the New Jersey Supreme Court,[60] but criticized the lower court for using "a somewhat crabbed notion of reasonableness" to invalidate the search.[61] The majority reanalyzed the facts and assumed that whether T.L.O. possessed cigarettes was relevant to the credibility of her denial of smoking, inferred that if she possessed cigarettes they likely would be in her purse, and concluded that therefore Choplick had reasonable suspicion to search her purse.[62] The Court used a plain-view rationale to justify his more intrusive search of her purse thereafter to uncover evidence of drug-related activities.[63] The Court found his actions justified at the inception, reasonably related in scope to the original justification, and upheld the search as reasonable. New Jersey used the evidence in both a school disciplinary proceeding and a delinquency prosecution.[64] *T.L.O.* did not distinguish the standard for admissibility—reasonable suspicion and probable cause—in those differing settings and endorsed the lower one for both.[65] By endorsing a lower Fourth Amendment standard, *T.L.O.* enables the state to convict juveniles with evidence found in school that would be inadmissible if offered against a similarly-situated adult.[66]

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[54] *Id.* at 341. *But see* Zane, *supra* note 1, at 390 (criticizing the majority for failing to weigh the comparative costs of requiring probable cause rather than reasonable suspicion and the negative effects of denying students full Fourth Amendment protections).

[55] 392 U.S. 1 (1967).

[56] *T.L.O.*, 469 U.S. at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1967)) (emphasis added).

[57] *Id.* at 341-42.

[58] *Id.* at 342 (emphasis added).

[59] *See infra* note 88 and accompanying text.

[60] *T.L.O.* emphasized that most lower courts did not require a probable cause standard, *T.L.O.*, 469 U.S. at 341, and reasoned that

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> [T]he special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause. These courts have, by and large, upheld warrantless searches by school authorities provided that they are supported by a reasonable suspicion that the search will uncover evidence of an infraction of school disciplinary rules or a violation of the law.

Id. at 332 n.2.

[61] *Id.* at 343.

[62] *Id.* at 343-46.

[63] *Id.* at 347.

[64] *Id.* at 329 n.1.

[65] Prior to *T.L.O.*, several lower courts had suggested that public school officials could search on less than probable cause for internal school disciplinary proceedings, but required probable cause if the state introduced the evidence at a delinquency trial. *See* Bahr v. Jenkins, 539 F. Supp. 483, 485-86 (E.D. Ky. 1982); Stern v. New Haven Cmty. Sch., 529 F. Supp. 31, 35-36 (E.D. Mich. 1981); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd,* 631 F.2d 91 (7th Cir. 1980); Erica Tina Helfer, Comment, *Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U. L.J. 119, 129-30 (1979).

[66] *See* Feld, *supra* note 5 (analyzing direct and collateral consequences of delinquency convictions for sentencing, transfer to criminal court, and sentence enhancement of adults); Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S.

Justice Brennan's dissent questioned the majority's adoption of a reasonableness standard to conduct full-scale searches "whose only definite content is that it is *not* the same test as the 'probable cause' standard found in the text of the Fourth Amendment."[67] He characterized the Court's resort to a balancing test as a departure from Fourth Amendment precedents that require probable cause and criticized it for unreasonably applying the standard to the facts of the case.[68] He predicted that *T.L.O.* effectively would immunize teachers and administrators from any obligation to respect constitutional limits.[69] Justice Stevens's dissent argued that the majority's balancing approach would allow officials to conduct highly intrusive searches to enforce trivial school rules.[70] Both dissents criticized the Court's reasonableness standard because it provided no guidance to school officials or to lower courts attempting to apply it.[71]

Justice Brennan questioned *T.L.O.*'s reasonableness balancing approach to govern full-scale searches. He argued that a full-scale search such as opening a closed purse and scrutinizing its contents required probable cause.[72] He distinguished between full-scale searches that require probable cause and less-intrusive police practices, such as stop-and-frisks, that use

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CAL. L. REV. 921, 934-35 (1997) (noting that delinquency adjudications can lead to students' suspension or expulsion and difficulty obtaining admission to college or jobs).

[67] *T.L.O.*, 469 U.S. at 354 (Brennan, J., concurring in part and dissenting in part).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 371 (Stevens, J., concurring in part and dissenting in part).

[71] *Id.* at 354 (Brennan, J. concurring in part and dissenting in part).

[72] *Id.* at 358. Brennan states:

> I emphatically disagree with the Court's decision to cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search. The Court's decision jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth Amendment—on the basis of its Rohrschach-like "balancing test." Use of such a "balancing test" to determine the standard for evaluating the validity of a full-scale search represents a sizable innovation in Fourth Amendment analysis.

Id. at 357-58.

a lower threshold of reasonable suspicion.[73] Under circumstances that constitute a full-scale search, no justification exists to employ a balancing test.[74] Brennan charged that the majority resorted to a reasonableness balance because it calculated that a lower standard than probable cause would enable school officials to search without meaningful constraints.[75]

Justice Brennan found *T.L.O.*'s adoption of a less-demanding search standard especially ironic in light of the Court's earlier decision in *Illinois v. Gates* to use a less-structured and more flexible approach to determinations of probable cause.[76] "Among the adjectives used to describe the [probable cause] standard were 'practical,' 'fluid,' 'flexible,' 'easily applied,' and 'nontechnical.' The probable-cause standard was to be seen as a 'commonsense' test whose application depended on an evaluation of the 'totality of the circumstances.'"[77] He questioned why administrators and teachers would find it too difficult to apply *Gates*'s common-sense, non-technical probable cause standard in the school setting.[78] Finally, he noted the *Terry* reasonable suspicion standard provided school officials with flexibility for less intrusive actions than full-scale searches.[79]

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[73] *Compare* Terry v. Ohio, 392 U.S. 1, 16-28 (1968) (adopting reasonableness balancing and upholding stop and frisk of outer garment based on reasonable suspicion), *with* Sibron v. New York, 392 U.S. 40, 62-67 (1968) (excluding evidence obtained by an intrusive search of pocket based on reasonable suspicion).

[74] *T.L.O.*, 469 U.S. at 362 (Brennan, J., concurring in part and dissenting in part).

[75] *Id.* at 362-63.

[76] Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (adopting "totality of the circumstances" approach to evaluations of probable cause). Prior to *Gates*, courts analyzed probable cause provided by informants using a two-prong rule announced in *Spinelli v. United States*, 393 U.S. 410 (1969), *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Draper v. United States*, 358 U.S. 307 (1959). *Gates* emphasized judicial discretion rather than rules or standards to govern probable cause determinations. *Gates*, 462 U.S. at 231-42.

[77] *T.L.O.*, 469 U.S. at 364 (citation omitted) (Brennan, J., concurring in part and dissenting in part).

[78] *Id.* Moreover, reliance on an amorphous "reasonableness" standard could "leave teachers and administrators uncertain as to their authority and will encourage excessive fact-based litigation." *Id.* at 367; *see also* Zane, *supra* note 1, at 388 ("[T]he state could either educate teachers about probable cause or assigu [sic] law enforcement officials to conduct school searches.").

[79] *T.L.O.*, 469 U.S. at 367 (Brennan, J., concurring in part and dissenting in part).

The majority did not respond directly to Justice Brennan's questions or justify its adoption of a reasonable suspicion standard to conduct full-blown searches. Even as *T.L.O.* acknowledged the relevance of a probable cause requirement, the majority simply asserted a preference for the lower, less-restrictive threshold.[80] Although the majority purported to use *Terry*'s balancing analysis, it ignored the significant differences in the intrusion on privacy—a protective frisk of outer clothing versus opening a closed purse—and the justification for intervention—a potentially armed suspect versus a disingenuous student.[81] *Terry* emphasized that both the justification for and scope of a frisk were less intrusive than a search.[82] Justice Brennan properly criticized the majority for failing to cite any cases which approved a full-scale search without probable cause.[83]

Justice Stevens objected to the majority's grant of unrestricted authority to school officials to conduct a full-blown search whenever they claimed a valid governmental interest.[84]

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[80] *Id.* at 340 (majority opinion). "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *Id.* at 341; *see* Rosemary Spellman, Comment, *Strip Search of Juveniles and the Fourth Amendment: A Delicate Balance of Protection and Privacy*, 22 J. JUV. L. 159, 170 (2001-02) (criticizing *T.L.O.* majority for failing "to explain why a search of a person's intimate possessions, which would be unreasonable if done to a free citizen in any other context, was reasonable in school").

[81] Terry v. Ohio, 392 U.S. 1, 30 (1968) (emphasizing that the officer "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons").

[82] *Id.* at 26 ("[I]t must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion.").

[83] *T.L.O.*, 469 U.S. at 360 (Brennan, J., concurring in part and dissenting in part) (distinguishing the Court's reliance on stop-and-frisk, border search, and administrative searches as "minimally intrusive searches that served crucial law enforcement interests" and not full-scale searches).

[84] *Id.* at 377 (Stevens, J., concurring in part and dissenting in part). Stevens states:

> The Court's standard for deciding whether a search is justified "at its inception" treats all violations of the rules of the school as though they were fungible. For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity.

If officials could search whenever they reasonably believed "*that the student has violated or is violating* either the law or *the rules of the school*," then they could conduct intrusive searches to enforce trivial regulations.[85] All rules are not equally important, and a reasonable balance requires a proportional relationship between the governmental interests asserted and the privacy interests intruded upon.[86] A substantial difference exists between the lethal danger confronted in *Terry* and *T.L.O.*'s compromised veracity.[87] Although the majority asserted that a search should not be "excessively intrusive in light of the age and sex of the student *and the nature of the infraction*," Stevens questioned what practical limits that imposed if a male disciplinarian could rummage through a young woman's purse—"a serious invasion of her legitimate expectations of privacy"—to find impeachment evidence marginally related to a minor smoking violation.[88]

The Court rejected any requirement of proportionality between the importance of a rule and the privacy intrusion its enforcement occasioned and simply deferred to school administrators' expertise.[89] "We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules."[90] The majority declined to second guess school officials' judgments about what rules they required to maintain discipline,

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Id.

[85] *Id.* (citing examples of trivial rules and regulations for which teachers could search).

[86] *Id.* at 378-79 ("[A] standard that varies the extent of the permissible intrusion with the gravity of the suspected offense is also more consistent with common-law experience and this Court's precedent.").

[87] *Id.* at 380 ("The logic of distinguishing between minor and serious offenses in evaluating the reasonableness of school searches is almost too clear for argument.").

[88] *Id.* at 376, 381-82. Stevens characterized Choplick's search as an overreaction to "a minor infraction—a rule prohibiting smoking in the bathroom of the freshmen's and sophomores' building . . . [T]he search for cigarettes merely tended to corroborate a teacher's eyewitness account of T.L.O.'s violation of a minor regulation designed to channel student smoking behavior into designated locations." *Id.* at 384.

[89] *Id.* at 342 n.9 (majority opinion).

[90] *Id.*

prevent harm, and promote a learning environment and gave them carte blanche to enforce all.

Analysts have criticized *T.L.O.* for abandoning Fourth Amendment jurisprudence and adopting a reasonableness balancing approach that provides no workable bases to analyze and answer different factual situations.[91] Commentators agree that the Court failed to justify its decision to use a lower search threshold for students in schools.[92] A common-sense, nontechnical probable cause standard is no more difficult for school officials to administer than a reasonable suspicion standard, except that it provides greater protection for students' privacy interests prior to governmental intrusion.[93] Reasonableness, by contrast, provides minimal guidance in advance, lends itself to abuse by school officials whom judges are loathe to characterize as acting "unreasonably," and discourages challenges to real constitutional violations because of its uncertainty.[94] *T.L.O.*'s application of the reasonable suspicion standard to the facts of the case effectively denied students any meaningful Fourth Amendment protections.[95] The Court's paternalistic stance toward students' privacy interests and its deferential posture to school officials presage further erosion of students' rights.[96]

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[91] *See, e.g.*, Zane, *supra* note 1, at 386-90 (criticizing *T.L.O.* for abandoning a probable cause standard and announcing a reasonableness standard that "does not provide a workable general framework for fourth amendment analysis; in most situations application of the reasonableness view is both illogical and unwieldy").

[92] *See* Irene Merker Rosenberg, New Jersey v. T.L.O.*: Of Children and Smokescreens*, 19 FAM. L.Q. 311 (1985); Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the* T.L.O. *School–Search Exception*, 66 N.Y.U. L. REV. 1077 (1991) (arguing that the balance of student and school interests varies with the context and that different interests apply to searches in school, to searches of vehicle in the school parking lot, and to searches conducted off-campus during extracurricular activities); Mary-Ellen Zalewski, Note, New Jersey v. T.L.O.*: Qualified Fourth Amendment Rights for Public School Students*, 64 OR. L. REV. 727 (1986); Zane, *supra* note 1.

[93] Zane, *supra* note 1, at 388 (arguing that "probable cause is at least as easy a standard to apply as reasonable suspicion").

[94] *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974) ("If there are no fairly clear rules telling the policemen [or school officials] what he may and may not do, courts are seldom going to say that what he did was unreasonable.").

[95] *See, e.g.*, Missy Kelly Bankhead, Note, New Jersey v. T.L.O.*: The Supreme Court Severely Limits Schoolchildrens' Fourth Amendment Rights When Being Searched by Public School Officials*, 13 PEPP. L. REV. 87, 88 (1985) (arguing that the Court's "strict application of the reasonable suspicion standard severely limit, and possibly overwhelm, any fourth amendment rights held by students").

B. Safford Unified School District #1 v. Redding—*Proportionality, Reason, and No Remedy*

A quarter-century later, the Court in *Safford Unified School District #1 v. Redding*[97] applied *T.L.O.*'s principles to a strip search of a thirteen-year-old girl to find prescription-strength ibuprofen and found that school officials acted unreasonably.[98] *T.L.O.* and *Redding* presented the constitutional issue to the Court in different procedural postures: T.L.O. moved to suppress evidence of drug dealing in a delinquency prosecution, whereas Savana Redding sought § 1983 civil relief for her constitutional violation. While Redding's innocence may have made it easier for the Court to find that school officials violated her rights, the majority still gave her no remedy for that infringement.[99] Ultimately, *Redding* provided no additional guidance for school administrators confronting somewhat different factual situations and thereby provided no clarification of *T.L.O.*'s ambiguous reasonableness standard.

A student-informant, Jordan Romero, told assistant principal Kerry Wilson that students were bringing drugs to school and that he had become ill after taking a pill obtained from a classmate.[100] A week later, Jordan gave Wilson a white pill he received from Marissa Glines and told him that students would take pills at lunch.[101] Wilson called Marissa out of class, and her teacher gave Wilson a day-planner found within Marissa's reach that contained contraband items.[102] A search of Marissa in Wilson's office produced a blue pill, white ones, and a razor blade.[103] Marissa told Wilson that she received the blue pill from Savana Redding and denied any knowledge of the day-planner.[104] Wilson did not ask Marissa when she received the pill from Savana, whether Savana presently had pills, or where on her they might be hidden.[105] Wilson called Savana to her office and showed her the planner.[106] Savana admitted it was hers, said that she had loaned it to Marissa several days earlier, and denied knowledge of its contents.[107] Wilson knew that Savana and Marissa were friends and members of a rowdy group of students who attended the school's opening dance at which staff found cigarettes and alcohol in the girls' bathroom.[108] Jordan had identified Savana as hosting a pre-dance party at which alcohol was served.[109]

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[96] Gardner, *supra* note 47, at 923-24; Zane, *supra* note 1, at 392 (concluding that *T.L.O.*'s reasonableness approach "may ultimately destroy those [students'] rights. Searches based on reasonable suspicion of the violation of the most trivial school rules may now pass constitutional muster.").

[97] 129 S. Ct. 2633 (2009).

[98] *Id.* at 2638.

[99] *Id.* at 2643-44 (finding that diversity of lower court decisions on validity of strip searches precluded finding that school officials violated a "clearly established" constitutional right and granting qualified immunity).

[100] *Id.* at 2640.

[101] *Id.* The pill was Ibuprofen 400 mg, a prescription-strength dose of the over-the-counter remedy. *Id.*

The Court found these circumstances provided reasonable suspicion for Wilson to search Savana's backpack and outer clothes.[110] After that search proved fruitless, Wilson subjected Savana to a strip search which also produced no evidence of wrong-doing.[111] Redding sought § 1983 relief for violation of her constitutional rights.[112] Both the trial court and a panel of the Ninth Circuit concluded that Wilson's search did *not* violate her rights.[113] After *en banc* reconsideration, the sharply divided Ninth Circuit bench concluded that the strip search violated the Fourth Amendment so egregiously that it denied the school officials qualified immunity.[114]

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[102] *Id.* at 2640. The zippered day-planner contained several knives, lighters, and a cigarette. *Id.* at 2638.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 2640.

[106] *Id.* at 2640-41.

[107] *Id.* at 2641.

[108] *Id.*

[109] *Id.*

[110] *Id.* ("If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than [female assistant's] subsequent search of her outer clothing.").

[111] *Id.*

> The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it. [Officials] directed Savana to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants . . . The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree . . . .

Id.

The Supreme Court affirmed in part and reversed in part. It agreed with the Ninth Circuit's conclusion that the strip search was unreasonable and violated the Fourth Amendment, but it denied any relief.[115] It found that the humiliating and intrusive strip search violated

> both subjective and reasonable societal expectations of personal privacy [and] support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.[116]

The Court distinguished between routine exposure when students change for gym and an accusatory and degrading body-search for evidence of wrong-doing.[117]

The Court invoked *T.L.O.*'s strictures that a search must be "reasonably related in scope to the circumstances which justified the interference in the first place . . . [and] not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[118] However, *Redding* did not discuss why Savana's age (thirteen years old) or her gender (female) rendered the strip search excessively intrusive nor did the Court indicate whether a similar search of an older youth or a boy would have produced a different result.[119] Although the Court did not prohibit strip searches, it characterized them as a uniquely intrusive type of search that required individualized suspicion to be justified. "The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions."[120] Despite the school's legitimate zero tolerance policy for drugs, *Redding* found that ibuprofen posed a limited threat and that without any reason to believe that Savana was hiding pills in her underwear, the search was unreasonable.[121]

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[112] *Id.* at 2639.

[113] Redding v. Safford Unified Sch. Dist. #1, 504 F.3d 828, 831, 835 (9th Cir. 2007).

[114] *Redding*, 129 S. Ct. at 2638. The Supreme Court requires a two-step process to evaluate officials' claims of qualified immunity. *See* Saucier v. Katz, 533 U.S. 194 (2001). First, a court must determine whether a constitutional violation occurred. *Id.* at 201. If so, then it must determine whether the state actors violated constitutional rights that were clearly established at the time of the search. *Id.* at 202.

[115] *Redding*, 129 S. Ct. at 2643-44.

[116] *Id.* at 2641.

[117] *Id.* at 2642.

[118] *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985)).

Notwithstanding the constitutional violation, the Court granted Redding no relief in her § 1983 lawsuit. It relied on the doctrine of qualified immunity that insulates public officials acting in good faith from liability unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[122] Although *Redding* noted that an explicit holding on the challenged action was not necessary to clearly establish a constitutional right, the Court emphasized the diversity among lower courts applying *T.L.O.*'s standard to strip searches.[123] The difference of opinions about justifications for and intrusiveness of strip searches warranted a grant of qualified immunity for the offending officials.[124]

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[119] Laura Jarrett, *Excessively Intrusive in Light of Age or Sex?: An Analysis of* Safford Unified School District #1 v. Redding *and Its Implications for Strip Searches in Schools*, 33 HARV. J.L. & GENDER 403, 409 (2010) ("[A]lthough the majority may have correctly found Savana's strip search excessively intrusive in this case, its failure to explain its reasoning sends an ambiguous message to school officials about which factors are most relevant in determining the permissible scope of a search.").

[120] *Redding*, 129 S. Ct. at 2643.

[121] *Id.* at 2642.

> [A] reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence . . . [of] students . . . hiding that sort of thing in underwear . . . .
>
> . . . [W]hat was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear.

Id. at 2642-43.

[122] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The doctrine of qualified immunity enables courts to summarily dismiss most challenges to constitutional violations.

> [T]he recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."

Id. at 807 (citations omitted).

Justices Stevens and Ginsburg concurred with *Redding*'s conclusion that her strip search violated the Constitution but dissented from the Court's decision to grant the school officials qualified immunity. The dissent objected that the majority made the question whether Wilson's actions violated a "clearly established constitutional right" seem closer than it was.[125] Stevens emphasized that "[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude."[126] He insisted that *Redding* did not create a new constitutional right but simply applied *T.L.O.*'s principle that a search may not be

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[123] *Redding*, 129 S. Ct. at 2643 ("A school official searching a student is 'entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment.'"). The Court cited several cases in which lower courts had upheld strip searches of students or denied recovery for such actions. *See* Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997) (en banc) (noting that the ambiguity of *T.L.O.*'s reasonableness balance made it impossible to apply to cases that presented different facts); Williams v. Ellington, 936 F.2d 881 (6th Cir.1991) (upholding strip search of high school student based on student's tip that did not include information that the drugs were hidden on her body); Colleen J. Berry, Note, *Students "Stripped" of Their Constitutional Rights:* Jenkins v. Talladega City Board of Educ., 115 F.3d 821 (11th Cir. 1997), 23 S. ILL. U. L.J. 223, 231 (1998) (criticizing *Jenkins*'s grant of qualified immunity and arguing that *T.L.O.* was sufficiently clear to establish that "teachers that strip search[] eight-year-olds in pursuit of a few dollars violates the Fourth Amendment"); Patsy Thimmig, *Not Your Average School Day—Reading, Writing, and Strip Searching: The Eleventh Circuit's Decision in* Jenkins v. Talladega City Board of Education, 42 ST. LOUIS U. L.J. 1389, 1412-13 (1998) (criticizing the *Jenkins* ruling because by "refusing to hold teachers accountable for using judgment that lacks any traces of common sense, the Eleventh Circuit is giving school officials absolute authority over their students.").

[124] *Redding*, 129 S. Ct. at 2644 ("[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law.").

[125] *Id.* at 2644-45 (Stevens, J., concurring in part and dissenting in part).

[126] *Id.* at 2644 (quoting New Jersey v. T.L.O., 469 U.S. 325, 382 n.25 (1985); *see also infra* note 486 and accompanying text.

"excessively intrusive in light of the age and sex of the student and the nature of the infraction" to her strip search.[127] Long before *Redding*, several states' statutes prohibited school officials from conducting warrantless strip searches.[128] Although the court in *Doe v. Renfrow* upheld a dog sniff of a student, it condemned her strip search based on the canine's alert.[129] *Tarter v. Raybuck* condemned a student's body cavity search and held that "privacy interests of the youth would clearly outweigh *any* interest in school discipline or order which might be served by such a search."[130] Several other lower courts condemned students' strip searches as excessively intrusive.[131] The strip search cases in which lower courts upheld the practice involved stronger individualized suspicion, multiple sources of information, "unusual bulges," and other indicia to justify the intrusion.[132] As I discuss later, *Redding* announced a fact-specific limited right without any practical remedy.

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[127] *Id.* at 2644-45 ("In this case, by contrast, we chart no new constitutional path. We merely decide whether the decision to strip search Savana Redding, on these facts, was prohibited under *T.L.O.*"). Justice Stevens also noted that *T.L.O.* had cited with approval *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984), which held unconstitutional a strip search conducted under circumstances similar to *Redding*. *Id.* at 2645.

[128] *See, e.g.*, CAL. EDUC. CODE § 49050 (West 1993) (prohibiting school officials from conducting a search that involves "removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil."); OKLA. STAT. ANN. tit. 70, § 24-102 (West 2005) (providing that "No student's clothing, except cold weather outerwear, shall be removed prior to or during the conduct of any warrantless search."); IOWA CODE ANN. § 808A.2 (West 1994); WASH. REV. CODE ANN. § 28A.600.230(3) (West 1995); WIS. STAT. § 948.50 (2007).

[129] 631 F.2d 91 (7th Cir. 1980), *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *and cert. denied*, 451 U.S. 1022 (1981). *See also infra* notes 303-08 and accompanying text analyzing *Doe*'s approval of canine sniffs.

[130] 742 F.2d 977, 982-83 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) (emphasis added).

[131] *See* Allen v. Koon, 720 F. Supp. 570 (E.D. La. 1989); Cales v. Howell Pub. Sch., 635 F. Supp. 454 (E.D. Mich. 1985); State v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993).

[132] *See* Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1319 (7th Cir. 1993) (multiple reports by students and school bus driver of youth's drug use, "unusual bulge," knowledge that youth had "crotched" drugs during a police raid, and failed urinalysis for cocaine); Williams v. Ellington, 936 F.2d 881, 887 (6th Cir. 1991) (facts supporting strip search included student tip, teacher report of unusual behavior, incriminating letter, and father's expressed concerns about daughter's drug use); Spellman, *supra* note 80, at 172 (analyzing decisions prior to *Redding* in which lower courts

C. Questions T.L.O. *Asked, Declined to Answer, and Which* Redding *Does Not Clarify*

The Court in *T.L.O.* found her search reasonable and declined to answer the original question for which it granted certiorari.[133] The Court uses a flexible due process approach to determine juveniles' procedural rights, provides delinquents with less rigorous protections than those required for criminal defendants,[134] and has not directly ruled whether delinquency prosecutions must provide an exclusionary remedy. In the context of school disciplinary proceedings, the Court in *Goss v. Lopez*[135] held that students have minimal due process protections—a right to notice and an opportunity for "some kind of hearing"—but explicitly denied them a right to counsel or proof beyond a reasonable doubt.[136] Despite Justice Stevens' urging that *T.L.O.* rule on the exclusionary rule question in delinquency prosecutions,[137] the Court has not decided whether school officials may consider illegally obtained evidence in internal disciplinary hearings.

In addition to the questions of remedies, or lack thereof, the majority in *T.L.O.* identified a number of other questions it did not answer. Although *T.L.O.* recognized the reasonableness of her expectations of privacy in her person and purse, the Court noted the possibility of a different result with respect to students' lockers or desks:

> We do not address the question, *not presented by this case*, whether a schoolchild has a legitimate expectation of

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generally found strip searches unconstitutional); Thimmig, *supra* note 123, at 1400-03 (analyzing facts in lower court cases which provided stronger basis for upholding strip searches).

[133] New Jersey v. T.L.O., 469 U.S. 325, 327 (1985) (declining to decide "the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities").

[134] *See generally* Feld, *supra* note 5; Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Courts*, 69 MINN. L. REV. 141 (1984).

[135] 419 U.S. 565 (1975).

[136] *Id.* at 579, 583.

[137] *T.L.O.*, 469 U.S. at 372-73 (Stevens, J., concurring in part and dissenting in part) (distinguishing the applicability of the exclusionary rule in delinquency prosecutions and school disciplinary proceedings).

> privacy in lockers, desks, or other school property provided for the storage of school supplies. Nor do we express any opinion on the standards (if any) governing searches of such areas by school officials or by other public authorities acting at the request of school officials.[138]

Do students have a reasonable expectation of privacy in desks and lockers that schools provide? Do they have a legitimate expectation of privacy in their jackets and backpacks stored in those lockers—i.e., private containers within containers? In addition, many students drive cars, and schools often provide and regulate the places in which they park their vehicles on campus. Despite the inherent mobility of automobiles, the Court requires probable cause to search cars.[139] After *T.L.O.*, which standard—probable cause or reasonable suspicion—governs searches of students' cars parked on school property?

The vice principal who searched T.L.O.'s purse did so without any police involvement. The Court justified its use of a reasonable suspicion, rather than probable cause, standard because he acted alone. It declined to speculate whether participation of police officers might require adherence to the real Fourth Amendment probable cause standard.

> We here consider only searches carried out by school authorities acting alone and on their own authority. *This case does not present* the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.[140]

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[138] *Id.* at 337 n.5 (emphasis added).

[139] *See* Chambers v. Maroney, 399 U.S. 42, 51 (1970) (noting that "the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution"); Carroll v. United States, 267 U.S. 132, 149 (1925) (dispensing with warrant requirement but insisting on probable cause to seize and search vehicles).

[140] *T.L.O.*, 469 U.S. at 341 n.7 (emphasis added); *see, e.g.*, Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1074

In the decades since *T.L.O.*, school resource officers and police liaison officers have become a ubiquitous presence in schools. They provide law enforcement services, investigate and interrogate youths, and arrest and refer law violators to juvenile courts. With uniformed police officers as regular fixtures in public schools, lower courts confront the question of which standard to apply—reasonable suspicion or probable cause—when they search students.

T.L.O. concluded that Choplick had reasonable grounds to search her purse based on the teacher's observation of smoke in the bathroom and his own inferences.[141] The teacher's reliability enabled the Court to avoid deciding how judges should evaluate allegations of wrong-doing provided by student-informants.[142] *T.L.O.* did not present issues of suspicion based on technological enhancements—metal detectors or canine partners—which could provide individualized suspicion.[143] Finally, *T.L.O.* did not decide whether school officials could conduct a reasonable search without specific information that they would find evidence of wrong-doing.

> *We do not decide* whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to

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(2003) (noting that the Court "expressed no opinion" regarding role of law enforcement acting with school officials).

[141] *T.L.O.*, 469 U.S. at 345-46.

[142] *Compare* Spinelli v. United States, 393 U.S. 410 (1969), *with* Illinois v. Gates, 462 U.S. 213 (1983).

[143] *See* Illinois v. Caballes, 543 U.S. 405 (2005) (characterizing canine sniff of exterior of vehicle as minimally intrusive and not affecting reasonable expectation of privacy in car's interior); Kyllo v. United States, 533 U.S. 27 (2001) (characterizing thermal imaging technological enhancements as a search—intrusion on reasonable expectation of privacy—when it enabled police to perceive activities within the home).

> assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"[144]

Subsequently, the Court in *Vernonia School District 47J v. Acton*[145] and in *Board of Education v. Earls*[146] eroded *T.L.O.*'s minimal threshold of individualized suspicion and upheld suspicionless drug testing of athletes and students who participate in extracurricular activities.

In light of *T.L.O.*'s failure to address the many questions it posed and *Redding*'s lack of clarification, Parts II–IV of this article analyze the answers that lower courts have reached. Part II examines the availability of exclusionary remedies in delinquency prosecutions and school disciplinary hearings. It also assays the standard used when law enforcement agents, rather than school officials, conduct searches. Part III focuses on when school officials may search—justified at its inception. How may school authorities obtain information to search—informants, dogs, and technology—and when may they search without any individualized suspicion of wrong-doing? Part IV examines where school authorities search—desks, lockers, and cars—and how intrusively they search—*Redding* and strip searches—without probable cause—reasonably related in scope to the original justification. Part V considers the remedies available to students when school officials search unreasonably.

PART II. *T.L.O.*'S UNANSWERED QUESTIONS – EXCLUSIONARY REMEDY AND SEARCHES BY POLICE

When police encounter juveniles and adults in non-school public places, courts apply the same Fourth and Fifth Amendment principles to their interactions.[147] Even in these contexts, youths may stand on a different footing than adults. The Court in *Roper v. Simmons* recognized youths' diminished responsibility and prohibited executions of offenders who committed crimes when younger than eighteen years of age.[148] *Roper*'s recognition of youths' immature judgment and limited capacity has implications for their waivers of Fourth, Fifth, and Sixth Amendment rights. The Court long has cautioned trial judges to be sensitive to the effects of youthfulness and immaturity on the voluntariness of juveniles' confessions.[149] Despite these concerns, the Court in *Fare v. Michael C.* and *Yarborough v. Alvarado* denied the need for special procedural protections when immature suspects exercise *Miranda* rights and endorsed the adult waiver standard: "knowing, intelligent, and voluntary" under the "totality of the circumstances."[150] By contrast, developmental psychologists who have studied adolescents' adjudicative competence and ability to exercise *Miranda* rights strongly question whether they possess the ability, maturity, and judgment necessary to exercise legal rights.[151] As a result of youths' diminished capacity, formal legal equality may produce practical inequality when judges apply adult standards to

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[144] *T.L.O.*, 469 U.S. at 342 n.8 (emphasis added) (internal citations omitted).

[145] 515 U.S. 646 (1995).

[146] 536 U.S. 822 (2002).

[147] *See generally* Lanes v. State, 767 S.W.2d 789 (Tex. Crim. App. 1989) (emphasizing centrality of Fourth Amendment probable cause standard in juvenile justice administration); Gardner, *supra* note 47, at 907; Lourdes M. Rosado, *Minors and the Fourth Amendment: How Juvenile Status Should Invoke Different Standards for Searches and*

Seizures on the Street, 71 N.Y.U. L. REV. 762 (1996) (discussing applicable Fourth Amendment standards in ordinary street encounters).

[148] 543 U.S. 551 (2005) (abolishing death penalty for juveniles based in part on youths' lack of maturity and judgment, impulsivity and recklessness, susceptibility to negative peer influences, and transitory personality development). *See generally*, Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9 (2008) (analyzing developmental psychological research and neuroscience evidence to support *Roper*'s finding of diminished responsibility).

[149] *See* Gallegos v. Colorado, 370 U.S. 49 (1962) (emphasizing role of youthfulness and isolation on involuntariness of confession); Haley v. Ohio, 332 U.S. 596 (1948) (emphasizing role of youthfulness and immaturity on involuntariness of confession).

[150] *See* Fare v. Michael C., 442 U.S. 707 (1979) (rejecting youthfulness as requiring special safeguards and applying adult waiver standard); *see also* Yarborough v. Alvarado, 541 U.S. 652 (2004) (rejecting special consideration of youthfulness and inexperience on suspect's feelings of custody).

[151] *See* Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980).

juveniles' waiver decisions.[152] Analysts have noted *Roper*'s diminished responsibility rationale for juveniles' exercises of legal rights and police interrogation.[153] Similarly, both courts and analysts recognize that developmental limitations adversely affect youths' ability to voluntarily consent to a search.[154] While the impact of youths' developmental limitations on their exercise of procedural rights poses important questions, this article focuses on *T.L.O.*'s unanswered Fourth Amendment questions.

A. Exclusionary Remedy in Delinquency and School Disciplinary Proceedings

Justice Stevens' *T.L.O.* dissent urged the Court to decide whether the exclusionary rule applied to unconstitutional searches conducted by school officials.[155] The Court has not ex-

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[152] *See* Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006); Feld, *Criminalizing Juvenile Justice*, *supra* note 134 (arguing that formal equality produces practical inequality and places juveniles at a comparative disadvantage in the justice process); Feld, *supra* note 5 (arguing that quality of justice in juvenile courts produces less reliable results than do criminal courts that afford right to jury trial).

[153] *See* Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385 (2008); Donna M. Bishop and Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125 (2007).

[154] *See In re* J.M. 619 A.2d 497, 503 (D.C. 1992) (emphasizing "the effect of age and relative immaturity on the voluntariness of the [fourteen-year-old] defendant's consent"); Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009).

[155] New Jersey v. T.L.O., 469 U.S. 325, 371-72 (Stevens J., concurring in part and dissenting in part). Justice Stevens emphasized that the case did not address the evidentiary use in school disciplinary hearings, but rather the use of evidence in delinquency "proceedings brought against T.L.O. [which] involved a charge that would have been a criminal offense if committed by an adult." *Id.* For those purposes, Justice Stevens invoked the dual rationales of *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary remedy to unlawfully obtained evidence in state criminal prosecutions). Both the deterrence and symbolic or judicial integrity rationales of *Mapp* require application of an exclusionary remedy to evidence obtained in violation of the Constitution.

> The practical basis for this principle is, in part, its deterrent effect and as a general matter it is tolerably clear to me, as it has been to the Court, that the existence of an exclusionary remedy does deter the authorities from violating

plicitly held that delinquency trials must provide an exclusionary remedy, and some pre-*T.L.O.* state courts had decided to the contrary.[156] The Court used a different incorporation strategy than it used in criminal prosecutions to decide which procedural rights delinquents received and denied them some fundamental rights such as a jury trial.[157] The Court repeatedly insists that it does not simply equate delinquency and criminal proceedings.[158]

> the Fourth Amendment by sharply reducing their incentive to do so. In the case of evidence obtained in school searches, the "overall educative effect" of the exclusionary rule adds important symbolic force to this utilitarian judgment.
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> . . . .
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> Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.

T.L.O., 469 U.S. at 372-74 (citations omitted).

[156] In *State v. Young*, 216 S.E.2d 586 (Ga. 1975), the Georgia Supreme Court reviewed a school search conducted without reasonable suspicion and declined to apply the exclusionary rule to a search of a student conducted in a public school. *Id.* at 588. Although the vice-principal acted as a state agent, the court distinguished between the applicability of the Fourth Amendment and availability of the exclusionary rule. *Id.* at 589. "The Fourth Amendment requires only state action; the latter requires state law enforcement action." *Id.* "In the Fourth Amendment area, in determining the reasonableness of a search, the social utility of the search must be balanced against the individual's reasonable expectation of privacy." *Id. Young* distinguished between the actions by school officials and those of law enforcement. It reasoned that the exclusionary rule does not apply in non-law enforcement circumstances and if school officials violated a student's Fourth Amendment rights, their remedy would be "based upon a claimed violation of their civil rights by state officers." *Id.* at 591.

[157] Feld, *Criminalizing Juvenile Justice*, *supra* note 134; Feld *supra* note 5. *Compare* Duncan v. Louisiana, 391 U.S. 145 (1968) (finding a jury right fundamental and required in state criminal prosecutions), *with* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (denying juveniles a constitutional right to jury trial).

[158] *McKeiver*, 403 U.S. at 545 ("The Court has refrained, in the cases heretofore decided, from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding."). *In re Gault* granted delinquents the Fifth Amendment privilege against self-incrimination. 387 U.S. 1, 49 (1967). The Supreme Court has never explicitly held that *Miranda* applies to delinquency proceedings, but the Court in *Fare v. Michael C.* "assume[d] without deciding that the Miranda principles were fully applicable to the present [juvenile] proceedings." 442 U.S. 707, 717 n.4 (1979).

1. Exclusionary Remedy in Delinquency Trials

T.L.O. did not decide whether juveniles may invoke an exclusionary remedy in delinquency prosecutions for violations of their constitutional rights. The Court has granted delinquents some procedural safeguards but has used a different incorporation strategy to determine juveniles' constitutional rights, declined to grant them all rights of adult criminal defendants, and insisted that it will not simply equate delinquency and criminal prosecutions.[159]

Notwithstanding the Court's reluctance to equate the two systems,[160] the vast majority of states have decided implicitly or explicitly that delinquents enjoy an exclusionary remedy for constitutional violations.[161] The unanimous Court in *Florida v. J.L.*[162] held that a general, anonymous tip did not justify the stop-and-frisk of a juvenile that led to seizure of a gun. Because the information lacked sufficient indicia of reliability to provide reasonable suspicion, the Court's holding reinstated the trial and Florida Supreme Court decisions to suppress the evidence against the juvenile. Professor Irene Rosenberg argues that *J.L.* implicitly held that outside of the school context, juveniles are entitled to the same Fourth Amendment protections as adults, including an exclusionary remedy:

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[159] *See* Schall v. Martin, 467 U.S. 253 (1984) (authorizing preventive detention of juveniles); Breed v. Jones, 421 U.S. 519 (1975) (holding that double jeopardy precludes criminal reprosecution after delinquency conviction); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (denying juveniles constitutional right to jury trial; *In re* Winship, 397 U.S. 358 (1970) (holding state must prove delinquency beyond a reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (granting procedural rights under Fourteenth Amendment Due Process clause rather than Sixth Amendment). *See generally* Feld, *Criminalizing Juvenile Justice*, *supra* note 134; Feld, *supra* note 5.

[160] *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 717 n.4 (1979) ("assum[ing] without deciding that the Miranda principles were fully applicable to the present [juvenile] proceedings.").

[161] *See* Irene Merker Rosenberg, *A Door Left Open: Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings*, 24 AM. J. CRIM. L. 29, 58 n.180 (1996) (listing statutes and court rules that explicitly provide an exclusionary remedy and decisions in which state courts implicitly accept exclusionary rule).

[162] 529 U.S. 266 (2000) (holding insufficient a tip alleging that a young black man wearing a plaid shirt would be found in a particular location and would be carrying a gun).

> The issue before the Court was, in effect if not form, whether to suppress the evidence obtained by the police during a frisk that is unlawful. The Court nonetheless framed the question as one of substance rather than remedy. . . .
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> . . . .
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> . . . [I]t was unnecessary for the Court to decide whether the exclusionary rule applies to juveniles as a matter of federal law since in Florida that right is granted by statute. Indeed, all states seem to have either explicitly or implicitly determined that the exclusionary rule applies at least to non-school searches of minors by police officers. That would mean that the *J.L.* Court is finding a substantive violation of the Federal Constitution that will be remedied by state law. . . .
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> . . . [The *T.L.O.* Court] may well have been assuming without stating that police searches of minors, at least out of school, would be governed by the usual Fourth Amendment stan-dard. . . .
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> . . . .
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> . . . The Court clearly understood that J.L. was a juvenile and that, by making its ruling in such a context, it was holding that the federal constitutional standard for frisks is the same for adults and children, at least with respect to police frisks outside of the public schools.[163]

Even without an explicit federal constitutional ruling, state courts consistently have applied the exclusionary rule in juvenile delinquency prosecutions.[164] When the state offers evidence illegally seized by school officials, courts readily conclude that "the exclusionary rule is fully available in criminal prosecutions and juvenile proceedings with respect to evidence illegally obtained by high school officials."[165] State courts recognize the Fourth Amendment's "twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people . . . that the government would not profit from its lawless behavior" apply equally to delinquency and criminal prosecutions.[166]

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[163] Irene Merker Rosenberg, Florida v. J.L. *and the Fourth Amendment Rights of Juvenile Delinquents: Peekaboo!*, 69 U. CIN. L. REV. 289, 291-95 (2000).

[164] *See In re* William G., 709 P.2d 1287, 1298 (Cal. 1985); *In re* Marsh, 237 N.E.2d 529, 531 (Ill. 1968) ("[T]he exclusionary rules required by the Fourth Amendment's prohibition against illegal search and seizures are applicable to proceedings under the Juvenile Court Act."); State v. Doe, 597 P.2d 1183, 1186 (N.M. 1979); *In re* L.L., 280 N.W.2d 343, 347 (Wis. 1979). *See generally*, Rosenberg, *supra* note 161 at 58 ("A substantial majority of states has decided, explicitly or implicitly, that the exclusionary rule applies to delinquency proceedings.").

2. Exclusionary Rule in School Disciplinary Proceedings

The Court has evinced a general hostility toward the exclusionary rules and expressed a disinclination to extend it to civil proceedings.[167] Unlike delinquency trials, courts decline to apply the exclusionary rule in school disciplinary proceedings when officials illegally seize evidence.[168] State courts' reluctance to require an exclusionary remedy in disciplinary proceedings stems from perceived differences in roles of school officials and police, uncertainty about the deterrent impact of the exclusionary rule on school personnel, and the Court's strong inclination to give them broad latitude to deal with student misconduct.[169] The court in *Thompson v. Carthage School District*[170] confronted an illegal, suspicionless mass-search that led to evidence upon which school officials relied to expel a student.[171] Despite the clear constitutional violation, the court conducted a cost-benefit analysis and declined to apply the exclusionary rule in school disciplinary hearings.[172] It weighed among the costs of providing an exclusionary remedy the fear that illegally searched youths could not be expelled or could pose a danger to their classmates.[173] It asserted that maintaining order required some flexibility in school disciplinary proceedings.[174] The court feared that an exclusionary rule could have an excessive chilling effect on school officials who typically do not have an adversarial relationship with students[175] and concluded that:

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[165] Gordon J. v. Santa Ana Unified Sch. Dist., 208 Cal. Rptr. 657, 665 (Cal. Ct. App. 1985).

[166] *In re* Montrail M., 589 A.2d 1318, 1325 (Md. Ct. Spec. App. 1991).

[167] *See* Hudson v. Michigan, 547 U.S. 586 (2006) (holding exclusionary rule is inapplicable in a criminal prosecution for violation of Fourth Amendment "knock and announce" requirement); I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding the exclusionary rule inapplicable in civil deportation proceeding); United States v. Leon, 468 U.S. 897 (1984) (creating a "good faith" exception to exclusionary rule); United States v. Janis, 428 U.S. 433 (1976) (declining to apply the exclusionary rule to illegal seized evidence in civil tax proceeding).

[168] *See In re* Lance W., 694 P.2d 744 (Cal. 1985); Gordon J. v. Santa Ana Unified Sch. Dist., 208 Cal. Rptr. 657, 665-66 (Cal. Ct. App. 1985) (holding that exclusionary rule did not apply in high school disciplinary proceedings because of risk of harm to other students). *See generally* Rosenberg, *supra* note 161, at 42-43.

[169] Rosenberg, *supra* note 161, at 42-43.

[170] 87 F.3d 979 (8th Cir. 1996).

[171] *Id.* at 980. After a school bus driver informed the principal of fresh cuts on the seat of the bus, the principal decided to search all male students in grades six to

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twelve. *Id.* During the search, a student told the principal that there was a gun at school. *Id.* The principal and teacher ordered each class of students to remove their jackets, shoes, and socks, empty their pockets, and place the items on a table. *Id.* They checked students for concealed weapons with a metal detector and conducted pat-down searches if it sounded. *Id.* The principal and teacher had no reason to believe that Ramone Lea, a ninth grade student, had cut the school bus seats, possessed a weapon or any other contraband. *Id.* A search of his coat revealed a match box that contained crack cocaine. *Id.* After school officials expelled him from school, Lea sought § 1983 relief for "wrongful expulsion" because the search violated the Fourth Amendment. *Id.* The district court awarded Lea $10,000 in damages, attorney's fees, and a declaratory judgment that the search violated his Fourth Amendment rights. *Id.* The district court assumed that the school could not expel a student on the basis of illegally obtained evidence. *See* D. Shayne Jones, *Application of the "Exclusionary Rule" to Bar Use of Illegally Seized Evidence in Civil School Disciplinary Proceedings*, 52 WASH. U. J. URB. & CONTEMP. L. 375, 387 (1997).

[172] *Thompson*, 87 F.3d at 981-82.

[173] *Id.* at 981.

> The societal costs of applying the rule in school disciplinary proceedings are very high. For example, the exclusionary rule might bar a high school from expelling a student who confessed to killing a classmate on campus if his confession was not preceded by *Miranda* warnings . . . . To the extent the exclusionary rule prevents the disciplining of students who disrupt education or endanger other students, it frustrates the critical governmental function of educating and protecting children.

Id.

[174] *Id.* "Moreover, 'maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures.' Application of the exclusionary rule would require suppression hearing-like inquiries inconsistent with the demands of school discipline." *Id.* (citation omitted).

[175] *Id.*

> Knowing that evidence they illegally seize will be excluded at any subsequent disciplinary proceeding would likely have a strong deterrent effect.
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> . . . .

> [W]e see some risk that application of the rule would deter educators from undertaking disciplinary proceedings that are needed to keep the schools safe and to control student misbehavior. In any event, any deterrence benefit would not begin to outweigh the high societal costs of imposing the rule.[176]

Using a cost-benefit analysis in which the costs of exclusion inevitably outweigh the benefits of constitutional conformity,[177] *Thompson* did not explain what incentive school officials would have to learn of or to respect students' rights or identify any practical remedy to induce constitutional compliance.[178] Because school personnel are less well-versed in Fourth Amendment doctrine than police officers and also enjoy qualified immunity for reasonable, good-faith mistakes, they have scant motivation to learn or respect limits without some systemic impetus for constitutional conformity.

By contrast, the court in *Jones v. Latexo Independent School District*[179] applied the exclusionary rule and barred use of unconstitutionally obtained evidence in school disciplinary proceedings. *Jones* followed the rationale of *Mapp v. Ohio* and concluded that exclusion provided the only available remedy for students whose rights school administrators violated.

> The primary vehicle for enforcing the strictures of the fourth amendment in our legal system is the "exclusionary rule," which prevents the use of unconstitutionally obtained evidence by the government in subsequent proceedings. While

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> . . . School officials, on the other hand, are not law enforcement officers. They do not have an adversarial relationship with students. "Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education."

Id. (citation omitted).

[176] *Id.* at 981-82.

[177] *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (conducting cost-benefit analysis and concluding that officers acting in "good faith" could not be deterred from violating the Constitution).

[178] Jones, *supra* note 171, at 397 (criticizing *Thompson* because it allows school officials to "trample on the substantive rights of students under the Fourth Amendment, knowing that even evidence which is seized illegally can be admitted to suspend or expel a student").

[179] 499 F. Supp. 223 (E.D. Tex. 1980).

> the exclusionary rule is most often employed in criminal cases, it has been resorted to on numerous occasions to redress fourth amendment violations in a variety of civil contexts as well.
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> . . . .
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> . . . "If there were no exclusionary rule in this case . . . [school] authorities would have no incentive to respect the privacy of its students."[180]

Jones reasoned that students' lack of resources with which to pursue civil remedies and school officials' good faith qualified immunity would insulate them from liability in almost every instance of constitutional wrong-doing.[181] Absent an exclusionary remedy within the school, officials would have no incentive to learn about or to observe constitutional limits.[182] Despite *Thompson*'s assertion to the contrary, other lower courts also had provided students with an exclusionary remedy in school disciplinary proceedings.[183] *Jones* is correct that an exclusionary remedy in disciplinary proceedings is the only practical mechanism to educate school officials and protect students. However, it ignored practical administrative questions such as who would rule on motions to suppress—the principal who conducted the search and presides at the disciplinary hearing or the school district's counsel? Would students then have to litigate their adverse rulings in court as did Jones?

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[180] *Id.* at 238 (alteration in original) (internal citations omitted).

[181] *Id.*

[182] *See, e.g.*, Caven S. McLoughlin, Lynn Sametz, & Victor L. Streib, *Prospective Educators' Knowledge of Children's Legal Rights*, 20 AM. EDUC. RES. J. 591 (1983) (surveying prospective teachers' knowledge about students' legal rights and concluding that "prospective educators have limited legal knowledge, and in specific cases have misconceptions about the law").

[183] *See, e.g.*, Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975); *see also* Charles W. Hardin, Jr., *Searching Public Schools:* T.L.O. *and the Exclusionary Rule*, 47 OHIO ST. L.J. 1099, 1108 (1986) ("[A] minority of courts appear to have adopted the view that the exclusionary rule does not require the suppression of evidence unconstitutionally seized [from students] by teachers and other school authorities."). *See generally* Kathleen K. Bach, *The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question After* New Jersey v. T.L.O., 37 HASTINGS L.J. 1133 (1986).

B. School Searches in Conjunction with or at the Behest of Law Enforcement—Police Presence Fuels a School-to-Prison Pipeline

T.L.O. emphasized that Choplick conducted the search without involvement of law enforcement officials.[184] In the 1980s, police departments began to assign sworn police officers—SROs—to schools to combat the scourge of drugs and in the 1990s to provide heightened security after high-profile school shootings.[185] Local law enforcement agencies typically assign school resource officers (armed and uniformed police officers) to schools where they perform traditional law enforcement duties—patrolling campus, investigating criminal allegations, and dealing with students who violate school rules or the law.[186] Expanded use of metal detectors and canine partners to detect weapons and drugs accompanied the heightened police presence and fostered a "prison-like" environment.[187] In addition to ordinary law enforcement responsibilities, SROs collaborate with schools to increase trust, prevent crime, and provide training and education in conflict resolution, drug abuse prevention (DARE) and the like.[188] The increased presence of police in schools heightens surveillance and increases opportunities for Fourth Amendment issues to arise.[189] Simply by virtue of their presence, police observe violations, and school personnel report incidents that previously would not have come to law enforcement's attention.[190] The increased presence of police has led to a dramatic escalation in school referrals to juvenile courts—a police-induced school

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[184] New Jersey v. T.L.O., 469 U.S. 325, 342 n.7 (1985).

[185] *See* Richard E. Redding & Sarah M. Shalf, *The Legal Context of School Violence: The Effectiveness of Federal, State, and Local Law Enforcement Efforts to Reduce Gun Violence in Schools*, 23 LAW & POL'Y 297, 298-302 (2001) (describing role of high-profile school shootings on enhanced security measures); Pinard, *supra* note 140, at 1068-69 (describing expanded role and presence of police in schools); ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 7 (2005) (noting that school districts have adopted the easiest and most visible response to school safety by "increasing the number of police patrolling hallways and giving them a greater role in disciplinary matters. In a growing number of schools, police are hired on a full-time basis. These officers are often assigned from local police departments to augment the school security staff."). They describe the multiple levels of police and security presence in schools:

> In some districts, local police departments assign officers to schools to perform specific duties. . . . In other places, . . . school districts have their own police departments, with all the powers of local police but with jurisdiction limited to school grounds. In addition to police officers, schools often employ their own security officers or subcontract with a security firm.

Id. at 17. *See also*, Randall R. Beger, *Expansion of Police Power in Public Schools and the Vanishing Rights of Students*, 29 SOC. JUST. 119 (2002) [hereinafter Beger, *Expansion of Police Powers in Public Schools*]; Randall R. Beger, *The "Worst of Both Worlds": School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336 (2003) [hereinafter Beger, *The "Worst of Both Worlds"*].

[186] Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009); RICHARD LAWRENCE, SCHOOL CRIME AND JUVENILE JUSTICE (2d ed. 2007); Aaron Kupchik & Nicole L. Bracy, *To Protect, Serve, and Mentor? Police Officers in Public Schools*, *in* TORIN MONAHAN & RODOLFO D. TORRES, SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC

EDUCATION 21, 24-28 (2010) (describing multiple roles of SROs including patrolling halls, investigating incidents, and participating in school discipline).

[187] Pinard, *supra* note 140, at 1075-76 (2003) (describing changing landscape of law enforcement presence in schools); Redding & Shalf, *supra* note 185, at 319-20 (suggesting that "[i]t is hard to find anything better than anecdotal evidence" to indicate that heightened security such as guards, metal detectors, and surveillance cameras reduce school gun violence); Theriot, *supra* note 186, at 283 ("American schools have been transformed into 'prisonlike' facilities, replete with locked doors, metal detectors, camera surveillance, and greater police presence."); Bernardine Dohrn, *The School, the Child, and the Court*, *in* A CENTURY OF JUVENILE JUSTICE 267, 283 (Margaret K. Rosenheim et al. eds., 2002) (observing that as a result of "get tough" policies, "[m]any schools became more prisonlike: locked doors, closed campuses, metal detectors, classroom lock-downs and simultaneous locker searches, heavily armed tactical police patrols, dogs, camera surveillance, uniforms, expansive disciplinary codes, interrogations, and informers—these are some elements that contributed to the criminalization of school life").

[188] CATHY GIROUARD, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP FACT SHEET: SCHOOL RESOURCE OFFICER TRAINING PROGRAM (Mar. 2001), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/fs200105.pdf; Andrea G. Bough, *Searches and Seizures in Schools: Should Reasonable Suspicion or Probable Cause Apply to School Resource/Liaison Officers?*, 67 UMKC L. REV. 543, 545 (1999) (describing functions of SROs as a law enforcement figure on campus, classroom resource for instruction in violence diffusion, alcohol and drug prevention, and as a member of school community to solve problems).

[189] Pinard, *supra* note 140, at 1079 (arguing that increased collaboration between police and school officials increases the latter's likelihood to report misconduct).

[190] Theriot, *supra* note 186, at 281 ("[M]ost crime occurring at schools historically has not been reported to police, yet having a police officer available and accessible at school facilitates reporting.") (internal citation omitted).

crime wave.[191] Assigning an SRO to a school increases the number of referrals to juvenile courts for minor offenses such as simple assaults and disorderly conduct.[192]

Schools that adopt zero tolerance policies toward trivial infractions adopt a "broken windows" theory that failure to sanction minor violations can lead to more serious crime and disorder.[193] As a result, school officials increasingly refer minor offenses—simple assaults, cursing as disorderly conduct, nail-clippers as knives—for delinquency proceedings that they previously handled internally and informally.[194] The combination of police presence and zero tolerance policies reduces schools' informal discretion, increases police power to refer youths to juvenile courts, and fosters a school-to-prison pipeline with a disparate impact on urban minority youths.[195] In light of expanded criminal consequences, which standard should courts apply when police search students in school: *Gates*'s probable cause or *T.L.O.*'s reasonable suspicion?[196]

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[191] *See* BLUE RIBBON COMM'N ON SCH. DISCIPLINE, A WRITTEN REPORT PRESENTED TO THE SUPERINTENDENT AND BOARD OF EDUCATION, CLAYTON COUNTY PUBLIC SCHOOLS (2007), *available at* http://www.clayton.k12.ga.us/departments/studentservices/handbooks/BlueRibbonExecutiveReport.pdf; Pinard, *supra* note 140, at 1106 ("[L]aw enforcement presence in public schools, particularly when combined with zero tolerance policies, creates an acute risk of utilizing the criminal justice system to handle incidents and behaviors that had been previously dealt with through school disciplinary processes.").

[192] Theriot, *supra* note 186, at 285 ("SROs contribute to criminalizing student behavior. Having an SRO at school significantly increased the rate of arrests for this charge [disorderly conduct] by over 100 percent even when controlling for school poverty."); Beger, *The "Worst of Both Worlds," supra* note 185, at 339 (describing criminal charges filed for "such minor infractions as pouring soapy water into a teacher's cup, threatening students in a lunch line not to 'eat all the potatoes,' and allegedly stealing two dollars from a classmate.") (internal citation omitted).

[193] George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1932, at 31 (positing that broken windows, left unattended, transmitted a societal message of indifference to disorder that contributes to further vandalism, serious crime, and urban deterioration); Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 79-81 (2003) (contending that "broken windows" theory contributes to zero tolerance policies in schools and suggesting that adherents believe that "by drawing a clear line, giving no quarter to disruption or disrespect, and setting high expectations, schools will instill the obedient and cooperative values of a former era").

[194] *See* Dohrn, *supra* note 187, at 283 ("Fighting, vandalism, and theft, traditionally handled within school disciplinary systems, were transformed into delinquency offenses."); Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852 (2008); NYCLU & ACLU, ELORA MUKHERJEE, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS (Phyllis Eckhaus et al. eds., 2007).

In *People v. Dilworth*, the local police department employed the SRO, a sworn police officer, whose duties at the school included preventing and detecting criminal activity, arresting offenders, and transporting them to the police station.[197] In deciding whether to apply "the less stringent reasonable suspicion standard for searches of students by school officials or the general standard of probable cause,"[198] the Illinois Supreme Court identified three categories of cases:

> (1) those where school officials initiate a search or where police involvement is minimal, (2) those involving school police or liaison officers acting on their own authority, and (3) those where outside police officers initiate a search. Where school officials initiate the search or police involvement is minimal, most courts have held that the reasonable suspicion test obtains. The same is true in cases involving school police or liaison officers acting on their own authority. However, where outside police officers initiate a search, or where school offi-

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[195] *See* Blumenson & Nilsen, *supra* note 193, at 66 (arguing that zero tolerance policies emphasize expulsion and suspension for "misconduct that previously would have been dealt with through lesser sanctions such as detention, or through remedial efforts such as counseling"); *see also* Dohrn, *supra* note 187, at 283 (criticizing school administrators because "[c]orporal punishment, humiliation, isolation, and referrals to the vice principal historically, and suspensions or expulsions today, are imposed disproportionately on African American youth, providing evidence of pervasive and systemic bias in school discipline"); Pinard, *supra* note 140, at 1108-19 (arguing that increased interdependence between police and school officials, expanded definitions of criminal misconduct, and racial differences in administration of zero tolerance policies foster school to pipeline flow).

[196] *See* Pinard, *supra* note 140, at 1070 (arguing that "the more protective probable cause standard [should] govern whenever law enforcement authorities are involved in student searches"); Bough, *supra* note 188, at 563 ("[SROs] are regular police officers who have training and authority that schools officials do not have. Thus, they are not the traditional school official. As such, they should operate under the constitutional standards that are applicable to police officers in general.").

[197] 661 N.E.2d 310, 313 (Ill. 1996).

[198] *Id.* at 316 (citing New Jersey v. T.L.O, 469 U.S. 325, 341 (1985)) (internal citations omitted).

> cials act at the behest of law enforcement agencies, the probable cause standard has been applied.[199]

The court characterized the liaison officer's search as an effort to maintain a proper educational environment and applied the reasonable suspicion rather than the probable cause standard.[200]

Dilworth rationalized its classification of SROs—category 2—with school officials—category 1—by using the three-prong analysis employed in *Vernonia School District 47J v. Acton*.[201] It weighed whether schools' special needs beyond those normally associated with law enforcement warranted a departure from the ordinary probable cause standard:

> The competing interests of the individual and the State were balanced by an examination of the following: (1) the nature of the privacy interest upon which the search intrudes, (2) the character of the search, and (3) the nature and immediacy of the governmental concern at issue, and the efficacy of the means for meeting it.[202]

The court balanced these factors—students' diminished expectation of privacy, the officer's individualized suspicion, and the school's need for immediate and effective intervention—and held that "reasonable suspicion, not probable cause, is the proper fourth amendment standard."[203] In so doing, the court appeared to focus more on where the search occurred than on who conducted it.[204]

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[199] *Id.* at 317 (internal citations omitted).

[200] *Id.*

[201] *Id.* at 318 (citing Vernonia Sch. Dist. 47 J v. Acton, 515 U.S. 646 (1995)).

[202] *Id.* at 318.

[203] *Id.* In its balance, *Dilworth* gave primary emphasis to schools' need to maintain social control:

> There is no doubt that the State has a compelling interest in providing a proper educational environment for students, which includes maintaining its schools free from the ravages of drugs. As to the efficacy of the means for meeting this interest, it is relevant that the search at issue took place at an alternate school for students with behavioral disorders. In order to maintain a proper educational environment at this particular school, school officials found it necessary to have a full-time police liaison as a member of its staff. The liaison officer assisted teachers and school officials with the difficult job of preserving order in this school.

Id. (citations omitted).

The dissent in *Dilworth* emphasized that the liaison officer's role in the school was to prevent and investigate crime and described him as a "police officer . . . permanently assigned to the school."[205] Because he acted in a law enforcement capacity, the ordinary probable cause standard, rather than the lower school reasonable suspicion standard, should govern his actions.[206] The principal disputes arise not among the first or third categories of the *Dilworth*'s tripartite classification—purely school or outside law enforcement—but in the intermediate category—searches initiated by SROs acting on their own authority.

Courts' assessments of the proper standard—reasonable suspicion or probable cause—to search often hinge on whether a school official or a police officer initiated it.[207] Where school officials possess reasonable suspicion and then enlist the assistance of better-trained SROs to conduct the search, courts typically apply the lower school standard.[208] They emphasize that student searches with SRO participation involve minimal searches and occur at the behest of school officials.[209] Courts opt for the lower standard when SROs search in "the interest of preserving swift and informal disciplinary procedures in schools."[210] By contrast, when outside police officers provide security at a high school dance, courts apply the ordinary probable cause standard.[211] When outside police search to uncover evidence of criminal activity, courts are more likely to require probable cause.[212] Because of the difference in search standards, courts confront a "silver platter" problem when police provide information to school officials to conduct a search under the lower standard because they lack probable cause.[213]

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[204] *See* Bough, *supra* note 188, at 555-56 (criticizing majority for ignoring that SRO's "duties appeared to be more in line with a regular law enforcement officer than a school official" and for focusing primarily on "where the search occurred (the school setting) than who conducted the search (school officials or police officers)").

[205] *Dilworth*, 661 N.E.2d at 321 (Nickels, J., dissenting).

[206] *See id.*

> Ruettiger was a police officer, and acted as one in seizing and searching defendant's flashlight . . . . After observing and questioning defendant in the hallway, Ruettiger seized and searched defendant's flashlight because he suspected it contained drugs. After finding cocaine, Ruettiger chased and captured defendant, arrested him, placed him in custody, handcuffed him, placed him in the squad car, and took him down to the investigative division of the Joliet police station. There, Ruettiger handcuffed defendant to a wall, read him his *Miranda* rights, and interrogated him. These were the acts of a police officer, not a school official . . . .

Id. at 322.

[207] Jason E. Yearout, Note, *Individualized School Searches and the Fourth Amendment: What's a School District to Do?*, 10 WM. & MARY BILL RTS. J. 489, 521 (2002) ("If a consensus exists in this area, it might be that the . . . question turns on who gets the proverbial ball rolling.").

[208] *See* F.S.E. v. State, 993 P.2d 771, 773 (Okla. Crim. App. 1999) (noting that "a school official may utilize law enforcement to assist with an investigation or search of a student while on school premises so long as the public school official has a reasonable

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suspicion as to the student under investigation or search"); State v. Angelia D.B., 564 N.W.2d 682 (Wis. 1997) (upholding "reasonable suspicion" search of student for a knife by school liaison officer whose assistanct principal enlisted after receiving tip). The court in *Angelia D.B.* reasoned that

> where a law enforcement official has an office in the school, one of the official's responsibilities as a school liaison officer is to assist school officials in maintaining a safe and proper educational environment. Because the report of a knife on school premises posed an imminent threat of danger to students and teachers, it is reasonable to conclude that [the school liaison officer] conducted the search . . . in conjunction with school officials and in furtherance of the school's objective to maintain a safe and proper educational environment.

Id. at 690.

[209] *See, e.g.*, State v. N.G.B., 806 So. 2d. 567, 568-69 (Fla. Dist. Ct. App. 2002) (noting search was initiated by a teacher who sought SRO assistance).

[210] *See* Cason v. Cook, 810 F.2d 188, 192 (8th Cir. 1987).

[211] *See* State v. Tywayne H., 933 P.2d 251, 253-54 (N.M. Ct. App. 1997) (rejecting *T.L.O.* and requiring probable cause when uniformed police officers initiated pat-down searches of students while providing security at high school prom); Michael Doyle, Note, *Search and Seizure—Police Searches on Public School Campuses in New Mexico*—State v. Tywayne H., 30 N.M. L. REV. 141, 149, 152–53 (2000) (distinguishing between *T.L.O.*'s rationale of lower standard to maintain school order and discipline and outside police's objective of search to secure criminal evidence).

[212] *See* F.P. v. State, 528 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1988); *In re* Josue T., 989 P.2d 431, 433 (N.M. Ct. App. 1999); *In re* D.D., 554 S.E.2d 346, 352 (N.C. Ct. App. 2001); *Angelia D.B.*, 564 N.W.2d at 687.

[213] Elkins v. United States, 364 U.S. 206, 208 (1960) (abolishing "silver platter" doctrine and prohibiting use in federal courts of evidence unconstitutionally seized by state officers); *In re* P.E.A., 754 P.2d 382 (Colo. 1988) (en banc) (upholding search based on reasonable suspicion after police officer provided school officials with information about contraband in student's car); State v. Heirtzler, 789 A.2d 634 (N.H. 2001) (applying probable cause standard when school and police had formal agreement that

As the majority and dissenting opinions in *Dilworth* indicate, "no clear case law exists as to whether SROs should be held to a probable cause standard, as are regular police officers, or whether they should be allowed to operate under the lesser reasonableness standard, as are school administrators."[214] Some courts justify a reasonable suspicion standard because law enforcement agencies assign SROs to schools to assist in maintaining a safe educational environment. If reasonable suspicion exists that a student has brought a weapon to school, then it is better for a professional police officer to conduct the search than an untrained teacher or school official.[215]

Analysts argue that courts should hold SROs to traditional probable cause requirements because of the increased presence of police officers in public schools and the convergence between school disciplinary emphases and law enforcement tactics.

> [T]he increased interdependency between school officials and law enforcement authorities . . . has greatly altered the methodologies and philosophies of school discipline processes. Most significantly, it has led to increased use of the juvenile and criminal justice systems to monitor and punish a broadened array of student conduct. As a result, there is a widening gulf between the more expansive use of law enforcement personnel in school discipline, along with the broadened categories of behaviors that could potentially introduce students to the criminal justice system, and the narrow (and narrow-

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school officials would conduct searches); Pinard, *supra* note 140, at 1090-1104 (analyzing cases involving police and school officials co-operation to manipulate applicable search standard).

[214] Bough, *supra* note 188, at 544; Beger, *The "Worst of Both Worlds," supra* note 185, at 345-48 (reviewing state appellate court decisions approving police searches in public schools without probable cause).

[215] *See* J.A.R. v. State, 689 So. 2d 1242, 1244 (Fla. Dist. Ct. App. 1997) ("It would be foolhardy and dangerous to hold that a teacher or school administrator, who often is untrained in firearms, can search a child reasonably suspected of carrying a gun or other dangerous weapon at school only if the teacher or administrator does not involve the school's trained resource officer or some other police officer."); *In re Josue T.*, 989 P.2d 431 (N.M. Ct. App. 1999); *Angelia D.B.*, 564 N.W.2d at 690; Pinard, *supra* note 140, at 1088-89 (reasoning that applying higher search standard to police "might cause school officials, who lack the expertise to pat-search for or neutralize dangerous weapons, to search students suspected of possessing dangerous weapons without the aid of a liaison officer") (citing *Angelia D.B.*, 564 N.W.2d at 690; *J.A.R.*, 689 So. 2d at 1243).

> ing) protections afforded students under the Fourth Amendment.[216]

Equating the search standard of school officials with SROs conflates the two despite the substantial difference in roles, disregards the greatly expanded police presence in school, and ignores the increased referrals of youths to juvenile courts from cases originating in schools.[217]

Schools' zero tolerance policies and the increased presence of police have fostered a school-to-prison pipeline of delinquency referrals for school misconduct.[218] In response to escalating youth violence in the late 1980s, Congress passed the Gun-Free Schools Act of 1994,[219] which required schools to expel students found on school property with firearms. States and schools responded by adopting laws and policies requiring suspension or expulsion of students who were found with any weapons or drugs or who committed violations on or near school grounds.[220] Three decades of research demonstrates that these policies disproportionately contribute to over-representation of black youths in disciplinary suspensions and expulsions.[221] Racial disparities in school suspensions and expulsions mirror racial disparities in juvenile justice administration following adoption of "get tough" policies.[222] Analyses of school disciplinary practices indicate that exclusionary practices cannot be attributed to socioeconomic class rather than race differences or to differences in types of behavior by race.[223] Rather, school personnel perceive poor black males as "troublemakers" or "dangerous" and a threat to teachers' control in the classroom.[224] Perceived threat of loss of control in the classroom leads to punitive responses that disproportionately affect black youths.[225] Once schools identify youths as troublemakers, school staff and police subject them to exclusionary practices, monitor them more closely, and increase their likelihood of future academic failure.[226] Disproportionately sanctioning minority youths who attend underperforming schools in weak and disorganized communities and who already experience higher school drop-out rates and impediments to work opportunities serves only to perpetuate their underclass status.[227]

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[216] Pinard, *supra* note 140, at 1070 (footnote omitted); *see* Beger, *The "Worst of Both Worlds," supra* note 185.

[217] Pinard, *supra* note 140, at 1069-70; *see also* Bough, *supra* note 188, at 561 (suggesting that courts should focus on: "(1) To whom are the police officers ultimately responsible, the school or the local law enforcement agency? (2) To what extent were the officers involved in the search? and (3) To what extent does the object of the search interfere with order in the school environment (i.e., drugs versus weapons)?").

[218] *E.g.*, Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Autumn (Fall) 2003, at 9. The authors argue that

> many school districts have adopted a zero-tolerance approach to school code violations. The result is a near doubling of the number of students suspended annually from school since 1974 (from 1.7 million to 3.1 million), an increase in the presence of police in schools, and the enactment of new laws mandating referral of children to law enforcement authorities for a variety of school code violations.

Id. at 10 (endnote omitted); *see also* Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URB. EDUC. 536, 544 (2007) (arguing that school discipline codes furnish few options other than suspension or expulsion for dealing with student misconduct). They contend that "[o]nce removed from the classroom because of fear of control and being labeled in this manner, there are relatively limited responses in the schoolwide discipline policy other than suspension or expulsion." *Id.* at 548.

[219] 20 U.S.C. § 7151 (2006); Pinard, *supra* note 140, at 1109 (attributing proliferation of zero tolerance policies in schools to Gun Free Schools Act). *See generally* Kupchik & Bracy, *supra* note 186, at 22 (attributing heightened police presence to Safe Schools Act of 1994 allocating federal funds to schools with serious crime problems to hire police; a 1998 amendment to the Omnibus Crime Control and Safe Streets Act that encouraged schools to participate in SRO model; and federal funding for Community Oriented Police Services (COPS) which enabled schools to hire SROs).

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[220] ADVANCEMENT PROJECT, *supra* note 185, at 15; ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE (2000) (reporting schools' treatment of paper clips, nail files and scissors as weapons); Blumenson & Nilsen, *supra* note 193, at 69 (characterizing expansive use of mandatory suspensions and expulsions as one element of zero tolerance policies); Dohrn, *supra* note 187, at 283 ("Within a year [of Congressional passage of the Gun-Free Schools Act], the federal prohibition was revised to 'dangerous weapon' rather than firearm, and the school exclusion stampede was launched. As states added drug possession, drug paraphernalia, or assaults on school personnel as a basis for suspension or expulsion, school exclusion skyrocketed."); Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1051 (2001) (describing expansive and irrational application of zero tolerance policies to trivial school violations); Joseph R. McKinney, *The Fourth Amendment and the Public Schools: Reasonable Suspicion in the 1990s*, 91 EDUC. L. REP. 455, 458 (1994) (reporting that nineteen states out of a sample of thirty-six states had special school-related drug trafficking laws and provisions for mandatory adult prosecution of juvenile violators).

[221] *See* Fenning & Rose, *supra* note 218, at 539-42 (reviewing literature documenting scope of and factors contributing to disproportionate minority discipline in schools); Chauncee D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1013 (2009) (noting impact of zero tolerance policies on school referrals to juvenile and criminal justice agencies).

[222] *See generally* FELD, *supra* note 10, at 264-66 (describing disproportionate increase in racial minority overrepresentation in juvenile courts and correctional facilities); PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT, & CONTROL ET AL., JUVENILE CRIME, JUVENILE JUSTICE (Joan McCord et al. eds., 2001) (reporting disproportionate confinement of minority youth after controlling for differences in rates of offending by race); Smith, *supra* note 221, at 1016-18 (describing racial disparities in school disciplinary referrals).

[223] Fenning & Rose, *supra* note 218, at 539-40 (reviewing literature and disputing claims that racial differences in exclusionary practices can be attributed to "socioeconomic differences among African American and White students, rather than race it-

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self," and that "African American youth engage in more severe behaviors to warrant such severe discipline").

[224] *Id.* at 537. Analysts of disproportionate minority confinement in the juvenile justice system attribute punitive responses to structural or perceived threats posed by minority youth. *See* George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998) (attributing differential processing of juveniles by race to attribution of sources of white youths' problems to external factors and black youths' misconduct to internal characteristics); Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 LAW & SOC'Y REV. 285 (1993) (attributing disproportionate minority confinement to structural inequality and perceived threat posed by youth).

[225] Blumenson & Nilsen, *supra* note 193, at 71-72 ("[Z]ero tolerance sanctions [apply] equally against weapons and alcohol offenses, drug sale and possession offenses, and assault and disorderly offenses. They also may apply against such infractions as tardiness, disrespect, and defiance, which, in addition to increasing the numbers, allow bias to creep into the decision to discipline."); Fenning & Rose, *supra* note 218, at 537 ("We would argue that a fear of losing control in the classroom on the part of educators, rather than an actual threat of dangerousness, sheds light on why our most vulnerable students fall into the web of exclusionary discipline consequences." (citation omitted)).

[226] *See, e.g.*, ADVANCEMENT PROJECT, *supra* note 185, at 12 (arguing that zero tolerance and criminalization policies adversely affect students who "face the emotional trauma, embarrassment, and stigma of being handcuffed and taken away from school—often shackled with an ankle-monitoring device. They must then serve time on probation with no slip-ups . . . . Once many of these youths are in 'the system,' they never get back on the academic track. Sometimes, schools refuse to readmit them; and even if these students do return to school, they are often labeled and targeted for close monitoring by school staff and police." (footnote omitted)).

[227] FELD, *supra* note 10, at 191-200 (describing structural origins of underclass isolation from societal mainstream); Blumenson & Nilsen, *supra* note 193, at 83-85 (arguing that zero tolerance policies contribute to and perpetuate racial underclass exclusion); Theriot, *supra* note 186, at 280-81 ("Students removed from school miss educational opportunities. These students also face humiliation and stigma from

The differences in police and school search standards comprise one element of the school-to-prison pipeline. Accordingly, analysts contend that courts should more closely evaluate searches in which police officers initiate or direct school officials.

> Such "involvement" should not be relegated to situations where officers play *proactive and directive* roles vis-à-vis school officials *in particular searches*. Rather, their "involvement" should be construed more expansively to include situations such as where the officers search students at the request of school officials, or are present during searches for purposes of ensuring compliance and providing the necessary "backup." . . . "[I]nvolvement" should include situations where school officials—through policies that simultaneously constrain their discretion while broadening the discretion of law enforcement authorities—in effect, collect evidence for law enforcement purposes.[228]

When police search for evidence to use in a delinquency or criminal prosecution, rather than internal school discipline, then courts should hold them to the traditional probable cause standard.

III. *T.L.O.*'S INDIVIDUALIZED SUSPICION—JUSTIFIED AT THE INCEPTION

Over the decades and in dozens of cases, the Supreme Court repeatedly has struggled to define probable cause and reasonable suspicion,[229] and only distinguished between the

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classmates and teachers after being led from school in handcuffs. Being stigmatized and labeled as an offender also might result in greater scrutiny, surveillance, and questioning from school staff and security. This type of regular suspicion and harassment could lead some students to drop out of school . . . .").

[228] Pinard, *supra* note 140, at 1119-20.

[229] *See generally* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE 165-81(5th ed. 2009) (discussing meaning and sources of probable cause). The Supreme Court has stated that the probable cause standard is "incapable" of a precise, exacting definition. Maryland v. Pringle, 540 U.S. 366, 371 (2003) (citing Illinois v. Gates, 462 U.S. 213, 232 (1983); Brinegar v. United States, 338 U.S. 160, 175 (1949)).

two concepts in *Terry v. Ohio*.[230] The differing standards reflect both the quantity and quality of information police must possess before they may act. Probable cause demands "a fair probability that contraband or evidence of a crime will be found in a particular place."[231] Reasonable suspicion requires "indicia of reliability" that an informant's tip justifies credence.[232] Ultimately, the verbal formulae do not lend themselves to easy quantification, clear classification, or easily administered criteria.[233] According to the Court, attempts to quantify probable cause or reasonable suspicion may be an exercise in futility. "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[234] As *Gates* emphasized, probable cause is a "fluid," "common-sense," and "practical" standard.[235] Assessments of probable cause under the "totality of the circumstances" hinge on whether the particular facts indicate a "substantial chance" of criminal activity.[236]

The Court's discussions of reasonable suspicion have been equally unilluminating and simply require "some objective manifestation that the [individual] . . . is, or is about to be, engaged in criminal activity."[237] As with probable cause, the Court opines that reasonable suspicion is a fact-specific concept that demands a level of flexibility.[238] Reasonable suspicion is a "commonsense, nontechnical conception[] that deal[s] with the 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[239] In *United States v. Sokolow*, the Court held that to establish reasonable suspicion:

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[230] Terry v. Ohio, 392 U.S. 1 (1968). As some commentators have recognized, "[p]rior to the Court's [1968] decision in *Terry v. Ohio*, probable cause, reasonable suspicion, reasonable cause, and reasonable belief had roughly the same connotation and were used interchangeably." Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 653 (2009) (citing Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 U. MICH. J.L. REFORM 465, 479-95 (1984); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 979-80 (2003)).

[231] *Gates*, 462 U.S. at 238.

[232] Adams v. Williams, 407 U.S. 143, 147 (1972).

[233] The Supreme Court has recognized the multiplicity of definitions of probable cause, and has tried to clarify its understanding by synthesizing the discussion: "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and . . . the belief of guilt must be particularized with respect to the person to be searched or seized." *Pringle*, 540 U.S. at 371 (quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979); *Brinegar*, 338 U.S. at 175).

[234] Gates, 462 U.S. at 232.

[235] *Id.* at 232, 238.

[236] *Id.* at 243 n.13.

[237] United States v. Cortez, 449 U.S. 411, 417 (1981).

> The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or hunch." The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," and [reasonable suspicion] . . . is obviously less demanding than that for probable cause.[240]

Simply put, the amount and reliability of information necessary to establish reasonable suspicion are less than that required to establish probable cause by some unquantifiable degree.[241] In *Redding*, Justice Souter distinguished the two standards with the cryptic observation:

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[238] The Court later stated that, along with probable cause, reasonable suspicion is also not "readily, or even usefully, reduced to a neat set of legal rules." United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting *Gates*, 462 U.S. at 232). In fact, the Supreme Court has said that other courts' attempts to "refine and elaborate" upon the understandings and requirements of reasonable suspicion unnecessarily muddles the evaluation. *Id.* at 7-8; *see also* Delaware v. Prouse, 440 U.S. 648, 654 (1979) ("[T]he reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." (footnotes omitted)).

[239] Ornelas v. United States, 517 U.S. 690, 695 (1996) (quoting *Gates*, 462 U.S. at 231; citing *Sokolow*, 490 U.S. at 7-8).

[240] *Sokolow*, 490 U.S. at 7 (internal citations omitted).

[241] Alabama v. White, 496 U.S. 325, 330 (1990) ("Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required [for] probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."); *see, e.g.*, Martin H. Belsky, *Random vs. Suspicion-Based Drug Testing in the Public Schools—A Surprising Civil Liberties Dilemma*, 27 OKLA. CITY U. L. REV. 1, 5 (2002) ("The difference between a probable cause standard and one of an articulated reasonable suspicion is substantial. Although it should not be applied too technically,

> Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raises a "fair probability" or a "substantial chance" of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.[242]

My criticism of *T.L.O.* and *Redding* is not that probable cause provides a clearer, more precise standard to search than does reasonable suspicion—a "substantial chance" versus a "moderate chance" that a search will uncover evidence. Rather, it is that the Court opted for the less stringent standard, increased the number of searches that school officials conduct, and allowed the state to introduce evidence against juveniles that would be inadmissible if seized from an adult under similar circumstances.

The reliability of information often hinges on its source. The Court has decided several cases in which an informant's tip provides the basis to establish probable cause or reasonable suspicion.[243] Earlier, the Court used a two-pronged test and evaluated both the informant's basis of knowledge and veracity to determine probable cause.[244] *Gates* rejected the two-pronged analysis in favor of a "totality of the circumstances" assessment, although it acknowledged that an informant's credibility

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probable cause is a much more formal, objective test . . . . To support reasonable suspicion, all that is needed is a particularized and articulated basis, that is rational or reasonable, to believe that the particular person may be guilty of an offense or that evidence of a crime may be present.") (footnote omitted).

[242] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2639 (2009) (internal citations omitted).

[243] *See White*, 496 U.S. at 326-27 (holding that an anonymous tip "corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion" to make a stop); United States v. Harris, 403 U.S. 573 (1971); *see also* Orrin S. Shifrin, *Fourth Amendment—Protection Against Unreasonable Search and Seizure: The Inadequacies of Using an Anonymous Tip to Provide Reasonable Suspicion for an Investigatory Stop:* Alabama v. White, 81 J. CRIM. L. & CRIMINOLOGY 760, 761 (1991) (describing use of anonymous tips when police receive information from unknown informant).

[244] *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

and factual basis remain relevant considerations.[245] Despite the undefined and inherent imprecision of the two concepts, the clear difference between the majority and dissenting justices in *T.L.O.* was whether to use the lower, watered-down standard. Justice Brennan criticized the *T.L.O.* majority's adoption of a reasonableness standard "whose only definite content is that it is *not* the same test as the 'probable cause' standard found in the text of the Fourth Amendment."[246]

A. Reasonable Suspicion to Justify School Searches: Informants, Metal Detectors, and Canine Partners

T.L.O. rejected the New Jersey Supreme Court's "crabbed notions of reasonableness" and concluded that Choplick possessed reasonable suspicion to search T.L.O.'s purse. Similarly, *Redding* concluded that Marissa's self-serving statements implicating Savana provided a reasonable basis to search her clothes and backpack. Courts have applied *T.L.O.*'s reasonable suspicion standard broadly to uphold virtually all types of school searches.[247] When courts assess the reasonableness of administrators' actions, they focus on the location and objects sought and give greater deference to searches for drugs or weapons than for missing money or property.[248] Although reasonable suspicion is the school-search standard,[249] it is not self-defining or self-evident. The chameleon-like drug-courier profile consists of numerous, contradictory factors which support reasonable suspicion.[250] Similarly, school personnel can construct almost any particularized justification after-the-fact to create a reasonable suspicion to search a student.[251] For example, a student suspected of alcohol or drug use may be sullen or boisterous,[252] lethargic or active,[253] arrive tardy or early for an activity,[254] and her eyes may be glazed or focused, direct or averted.[255]

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[245] Illinois v. Gates, 462 U.S. 213, 238 (1983). In the area of information provided by known or anonymous informants, the *Gates* Court concluded that "it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations." *Id.* (footnote omitted). Fourth Amendment scholar Wayne LaFave has argued the *Gates* Court misunderstood the flexibility of the two-pronged test, and consequently, it unnecessarily and "unwisely rejected the *Aguilar-Spinelli* two-pronged test, reasoning that it improperly gave the veracity and basis of knowledge elements 'independent status' when actually 'a deficiency in one may be compensated for . . . by a strong showing as to the other.'" 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.3(b), at 130 (4th ed. 2004) (alteration in original) (footnote omitted).

[246] New Jersey v. T.L.O., 469 U.S. 325, 354 (1985) (Brennan, J., concurring in part and dissenting in part).

[247] *Id.* at 343 (majority opinion); *see* Thompson v. Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996); Williams *ex rel.* Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991); Cason v. Cook, 810 F.2d 188 (8th Cir. 1987); James *ex rel.* James v. Unified Sch. Dist. No. 512, 899 F. Supp. 530 (D. Kan. 1995). *See generally* McKinney, *supra* note 220, at 457 (analyzing all searches based on reasonable suspicion between 1985 and 1993).

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[248] *See* Burnham v. West, 681 F. Supp. 1160 (E.D. Va. 1987); People v. Alexander B., 270 Cal. Rptr. 342 (Cal. Ct. App. 1990); McKinney, *supra* note 220. McKinney identifies four constellations of factors that courts consider to determine reasonable suspicion:

> 1. The student's age and history of disciplinary problems both within and without the school context (i.e., known criminal record);
>
> 2. The extent and seriousness of the problem in the school and in the community to which the search was directed;
>
> 3. The existence of exigent circumstances necessitating an immediate search (to prevent violence or destruction of evidence);
>
> 4. A "totality of the circumstances" approach in determining the reliability and probative value of the information school officials use to justify the search.

Id. at 459.

[249] *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982) (per curiam) (requiring individualized suspicion under reasonable belief standard); Kuehn v. Renton Sch. Dist. No. 403, 694 P.2d 1078 (Wash. 1985). In *Kuehn*, teachers on previous extracurricular band trips found that students brought liquor in their luggage. *Kuehn*, 694 P.2d at 1079. The court concluded that experience alone did not justify a search of students' luggage as a prerequisite to boarding the bus for a concert. *Id.* at 1081 ("To meet the reasonable belief standard, it was necessary for the school officials to have some basis for believing that drugs or alcohol would be found in the luggage of each individual student searched."). By contrast, the court in *Desilets ex rel. Desilets v. Clearview Regional Board of Education*, 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993), upheld a nondiscretionary search of the hand luggage of all students participating in a field trip. The court recalled

> the rich opportunity for mischief which the field trip provides to some students. The need for close supervision in the schoolhouse is intensified on field trips where opportunities abound to elude the watchful eyes of chaperones. Administrators and teachers have a duty to protect students from the misbehavior of other students. In the context of a field trip, we add to that burden the duty to protect the general population from student mischief.
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> . . . .
>
> The deterrent effect of the board's search policy advances the legitimate interest of the school administrators in preventing students from taking contraband, in the broadest sense of the word, on field trips.

Id. at 672-73 (internal citations omitted); *see also* Yearout, *supra* note 207, at 490 (describing tension between protecting school safety and respecting constitutional rights).

In addition to school staff or teachers' personal observations, they may receive tips from other school personnel, known students, anonymous informants, dogs, and technology to provide reasonable suspicion to search.[256] Fourth Amendment decisions rendered in other contexts provide courts with guidance to evaluate the quantity and quality of information required to justify intrusions on privacy.

1. Informants

The strip search in *Redding* rested on Marissa's guilt-evading assertion that she received pills from Savana.[257] The Court found that Jordan and Marissa's allegations provided reasonable suspicion to search her clothes and backpack.[258] However, it ruled narrowly that the strip search was too intrusive without individualized suspicion that Savana might have drugs hidden in her underwear.[259] Unfortunately, *Redding* missed an opportunity to clarify for lower courts and school officials why those facts justified a search of her outer clothes and backpack but not a strip search. If Wilson lacked a reasonable basis to believe that Savana had pills in her underwear, then what reason did he have to believe they would be found anywhere else on her person?[260] Similarly, in *T.L.O.*, what more than an "unparticularized suspicion or hunch" did Choplick possess that she had cigarettes in her purse?

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[250] *See* United States v. Taylor, 956 F.2d 572 (6th Cir. 1992) (finding that a sloppily dressed deplaning passenger provides reasonable suspicion).

[251] McKinney, *supra* note 220, at 457 (surveying all post-*T.L.O.* cases between 1985 and 1993 and reporting that courts upheld searches based on reasonable suspicion in thirty-one of thirty-six cases). Between 1990 and 1993, courts found school administrators lacked reasonable suspicion in two of twenty cases. *Id.* One-third of cases in the 1990s involved searches for guns, all of which courts upheld. *Id.* at 457-58.

[252] *Compare* Cornfield v. Consol. High Sch. Dist. 230, 1992 WL 59106 (N.D. Ill. 1992) (finding sullenness provides reasonable suspicion), *with* Hedges v. Musco, 33 F. Supp. 2d 369 (D.N.J. 1999) (gregariousness provides reasonable suspicion).

[253] *See, e.g.*, Kraslawsky v. Upper Deck. Co., 65 Cal. Rptr. 2d 297 (Cal. Ct. App. 1997) (suggesting that lethargic responses may provide reasonable suspicion).

[254] *See* Bartram v. Pennsbury Sch. Dist., 1999 WL 391480 (E.D. Pa. 1999) (lateness provides basis for reasonable suspicion).

[255] *See* United States v. McRae, 81 F.3d 1528, 1531 (10th Cir. 1996) (focused or fixed stare provides reasonable suspicion).

[256] *See generally* Gardner, *supra* note 47; Myron Schreck, *The Fourth Amendment in the Public Schools: Issues in the 1990s and Beyond*, 25 URB. LAW. 117 (1993).

[257] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2638 (2009).

[258] *Id.* at 2641.

Lower courts have struggled with tips provided to school officials by student-informants. Even when courts evaluate informant tips under *Gates*'s "totality of circumstances"[261] approach, factors like informants' veracity,[262] declarations against penal interests,[263] and other "indicia of reliability"[264] remain relevant to determinations of probable cause and reasonable suspicion. The critical question is whether the information only provides a basis for further investigation or justifies immediate action. Courts apply a deferential standard when school officials act based on student-informants' tips. "Absent information that a particular student informant may be untrustworthy, school officials may ordinarily accept at face value the information they supply."[265] Similarly, school officials may rely on anonymous tips that provide specific details if the allegation is plausible because of conditions at the school.[266] The Court in *Williams ex rel. Williams v. Ellington*,[267] evaluated a tip under the "totality of the circumstances" which included the reliability of the informant. However, school settings provide unique opportunities for students to unfairly implicate others in wrong-doing and, unlike declarations against penal interests, false allegations to school officials carry no criminal consequences to assure their veracity.[268]

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[259] *Id.*

[260] *Id.* at 2642-43 ("[W]hat was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear.").

[261] Illinois v. Gates, 462 U.S. 213 (1983) (noting relevance of credibility and factual-basis to evaluations of probable cause).

[262] *See id.*; Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

[263] United States v. Harris, 403 U.S. 573 (1971) (finding declaration against penal interest by a known informant sufficient to establish credibility).

[264] Adams v. Williams, 407 U.S. 143 (1972).

[265] S.C. v. State, 583 So. 2d 188, 192 (Miss. 1991); *see also* Florida v. J.L., 529 U.S. 266, 274 (2000) (holding that uncorroborated tip was insufficient to conduct frisk and search). Even though the Court in *J.L.* held the particular search invalid, it cautioned that it did not hold that "officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as . . . schools, cannot conduct protec-

2. Metal Detectors in Public Schools

The threats of violence and weapons are facts of life in many schools. Magnetometers (metal detectors) have become standard features in airports and public buildings, such as courthouses. However, people may choose whether or not to enter those spaces, and if they do so, then they have consented to expose themselves to those devices. By contrast, compulsory attendance laws require students to attend school and to sub-

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tive searches on the basis of information insufficient to justify searches elsewhere." *Id.* at 274.

[266] *See* Martens *ex rel.* Martens v. Dist. No. 220, 620 F. Supp. 29 (N.D. Ill. 1985); Leigh Taylor Hanson, Note, *Psst! Janie's Got a Gun: Anonymous Tips and Fourth Amendment Search and Seizure Rights in Schools*, 37 GA. L. REV. 267, 270 (2002) ("[A]nonymous tips should automatically satisfy the reasonable suspicion standard in schools, particularly in cases where the tip involves firearms or drugs."); *see also* McKinney, *supra* note 220, at 460 ("In the vast majority of . . . cases . . . school officials relied on information supplied by student informants to justify, at least in part, the search of another student.").

[267] 936 F.2d 881 (6th Cir. 1991).

[268] *See id.* at 888-89 ("While there is a concern that students will be motivated by malice and falsely implicate other students in wrongdoing, that type of situation would be analogous to the anonymous tip. Because the tip lacks reliability, school officials would be required to further investigate the matter before a search or seizure would be warranted."); Phaneuf v. Fraikin, 448 F.3d 591, 598-99 (2d Cir. 2006) ("While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search."); *see also* Hanson, *supra* note 266, at 283 ("Anonymous tips occur frequently in the school context. Students do not want to 'rat' on each other and fear loss of reputation or even a loss of safety for telling on another student. Instead, students want to take the burden off themselves and anonymously warn of the potential threat." (footnote omitted)).

mit to such technology.[269] The Court has considered the uses of technologies to search in several contexts. *Kyllo v. United States* characterized the use of thermal-imaging technology that revealed information about the interior of the home as a search that required probable cause.[270] By contrast, *Illinois v. Caballes* concluded that the use of a dog to sniff the exterior of a car did not intrude on any reasonable expectation of privacy and therefore did not require any prior factual justification.[271]

May schools install metal detectors to limit the introduction of weapons at schools?[272] Does requiring students to walk through a metal detector constitute a search that requires reasonable suspicion?[273] If a student sets off an alarm, then how intrusively may school personnel search her? In *In re F.B.*, the court did not require individualized suspicion to install and use a metal detector at an urban high school because of high rates of violence and the minimal intrusion caused by screening.[274] In *People v. Pruitt*, the court used *T.L.O.*'s balancing approach and found that reality of school violence and the minimal intrusiveness justified metal detector screening.[275] Courts routinely approve the use of hand-held metal detectors to randomly check students for weapons and do not characterize such practices as searches.[276] They rationalize that the overriding need to protect students from weapons outweighs individual privacy interests.[277] The sounding of an alarm then provides the reasonable suspicion to conduct a frisk or more intrusive search.

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[269] LAWRENCE F. ROSSOW & JACQUELINE A. STEFKOVICH, SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS 34 (2d ed. 1995) ("A distinction should be made between the use of a detector at locations where members of the public can prevent the search by choosing not to enter . . . . Unlike a passenger at an airport the student is not free to terminate the search."); Crystal A. Garcia & Sheila Suess Kennedy, *Back to School: Technology, School Safety and the Disappearing Fourth Amendment*, 12 KAN. J.L. & PUB. POL'Y 273, 274 (2003) (describing five most commonly used school security technologies as security cameras, recording systems, hand-held or walk through metal detector systems, duress alarms, and entry control devices); Gardner, *supra* note 47, at 943 ("[B]ecause students are compelled to attend school, unparticularized school searches are inherently more coercive, and therefore more intrusive, than those experienced at checkpoints and airports by persons free to avoid those intrusions by simply going elsewhere.").

[270] 533 U.S. 27 (2001).

[271] 543 U.S. 405 (2005).

[272] ADVANCEMENT PROJECT, *supra* note 185, at 11 (describing the array of security measures schools employ). "Visible measures to prevent serious crime in schools include: school security officers, police officers, metal detectors, tasers, canine dogs, drug sweeps, SWAT teams, biometric hand readers, and surveillance cameras." *Id.*

[273] *See* Robert S. Johnson, *Metal Detector Searches: An Effective Means to Help Keep Weapons Out of Schools*, 29 J.L. & EDUC. 197, 202-03 (2000) (arguing that metal detector screening of students is constitutional); Michael Ferraraccio, Note, *Metal Detectors in the Public Schools: Fourth Amendment Concerns*, 28 J.L. & EDUC. 209, 224-29 (1999) (arguing that use of metal detectors constitutes a suspicionless search that violates Fourth Amendment Rights).

[274] 658 A.2d 1378 (Pa. Super. Ct. 1995).

3. Canine Partners in Schools

The use of dogs to sniff students, lockers, or cars may either provide reasonable suspicion to justify a search or may itself constitute a search that requires pre-existing individualized suspicion.[278] In *Illinois v. Caballes*,[279] the Court found that the use of a dog during a reasonable traffic stop did not prolong the encounter and the sniff of the air around the car for contraband did not intrude on any reasonable expectation of privacy.[280] *Caballes* relied on the Court's earlier dicta in *United States v. Place* that "treated a canine sniff by a well-trained narcotics-detection dog as '*sui generis*' because it 'discloses only the presence or absence of narcotics, a contraband item.'"[281] *Caballes* distinguished the use of dogs from more intrusive technologies, such as the thermal-imaging invalidated in *Kyllo v. United States*.[282] A dog sniff during a traffic stop detects nothing but contraband, whereas thermal imaging intrudes on the privacy of the home *and* reveals lawful, intimate and personal details, as well as possible illegal activity.[283] If a sniff is not a search, then police do not need individualized suspicion before they deploy canine partners.[284]

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[275] 662 N.E.2d 540 (Ill. App. Ct. 1996); *see* Eugene C. Bjorklun, *Using Metal Detectors in the Public Schools: Some Legal Issues*, 111 EDUC. L. REP. 1 (1996); Ferraraccio, *supra* note 273, at 224-29 (arguing that schools' use of metal detectors to conduct suspicionless searches violates students' Fourth Amendment rights).

[276] *See* People v. Latasha W., 70 Cal. Rptr. 2d 886 (Cal. Ct. App. 1998) (approving use of hand-held metal detectors to randomly wand students for weapons); State v. J.A., 679 So. 2d 316 (Fla. Ct. App. 1996); People v. Dukes, 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992); *In re* S.S., 680 A.2d 1172 (Pa. Super. Ct. 1996) (approving use of hand-held wands even without school history of violence).

[277] *See* Robert S. Johnson, *Metal Detectors in Public Schools: A Policy Perspective*, 80 EDUC. L. REP. 1 (1993); Johnson, *supra* note 273; Ferraraccio, *supra* note 273.

[278] *See generally* ROSSOW & STEFKOVICH, *supra* note 269, at 17.

[279] 543 U.S. 405 (2005).

[280] *Id.* at 409.

> [T]he use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view,"—during a lawful traffic stop, generally does not implicate legitimate privacy interests. . . . Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Id. (citation omitted) (quoting United States v. Place, 462 U.S. 696, 707 (1983)).

Justice Souter's *Caballes* dissent objected that the majority's ruling that a sniff is not a search placed the use of dogs outside the scope of Fourth Amendment review.[285] He disputed the majority's assumption about the infallibility of dogs and warned that canines' false-positive error rate could lead to excessive intrusions on privacy.[286] Justice Ginsburg's dissent argued that the use of dogs qualitatively changes the nature of an otherwise lawful encounter and should require reasonable suspicion for that heightened intrusion.[287] She warned that the

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[281] *Id.* (quoting *Place*, 462 U.S. at 707).

[282] 533 U.S. 27 (2001).

[283] *Caballes*, 543 U.S. at 410 ("The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car.").

[284] State courts often require reasonable suspicion before use of dogs. *See, e.g.*, Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987).

[285] *Caballes*, 543 U.S. at 410 (Souter, J., dissenting).

[286] *Id.* at 412-13. Justice Souter argued that dogs' fallibility undermines *Place*'s justification to treat sniffs as *sui generis* and warned that:

> [T]he sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime . . . . Thus in practice the government's use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area.

Id.

[287] *Id.* at 421-22 (Ginsburg, J., dissenting).

> A drug-detection dog is an intimidating animal. Injecting such an animal into a routine traffic stop changes the character of the encounter . . . . [It] becomes broader, more adversarial . . . .
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> . . . .

Court's holding would allow police to use dogs in parking lots and public places without any factual justification.[288]

If a dog sniff does not intrude on any reasonable expectations of privacy, then police may deploy them routinely in airports, courthouses and other public buildings without any particularized suspicion. The availability of canine resources and anticipated cost-benefits of their use provide the only constraints on their deployment. May school officials assert a similar special need and enlist the assistance of canine partners to sniff students, their lockers, or their cars parked in school lots? Justice Ginsburg cautioned that the presence of a dog changed the character of the intrusion on privacy and expanded the scope of searches. Should school officials have reasonable suspicion before police walk dogs around students' cars or lockers? Should police have individualized suspicion before dogs sniff students?

a. Canine Sniffs of Students

Significantly, *Caballes* involved a sniff of a car rather than a person. Does a sniff of a person involve a different intrusion on privacy than a sniff of luggage or cars? Fourth Amendment analysts argue that a sniff of a person is qualitatively different and that constitutional prerequisites—reasonable suspicion or probable cause—should apply.[289] If a dog alerts to a particular student, then does that signal provide school officials and/or police with reasonable suspicion or probable cause to conduct a

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> . . . Today's decision . . . clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green.

Id. (alteration in original) (citations omitted).

[288] *Id.*

[289] 1 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(g) at 537 (4th ed. 2004) (arguing that a canine sniff of a person "is embarrassing, overbearing and harassing, and thus should be subject to Fourth Amendment constraints"); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246-47 (1982) ("[T]he very act of being subject to a body sniff by a German shepherd may be offensive at best or harrowing at worst.").

more thorough search of the person? Does a dog's alert coupled with an unsuccessful search of a student's outer clothing provide the individualized suspicion that *Redding* required to conduct a strip search? Heightened security in schools to combat drugs provides fertile ground to litigate these questions.

The Supreme Court has not decided whether sniffs of people require greater justification than sniffs of cars. Lower courts are divided whether school administrators and police must possess reasonable suspicion when handlers direct the dog at students rather than their property.[290] In *Doe v. Renfrow*,[291] school officials enlisted local police and canine partners to combat the school's drug problem.[292] School officials and police agreed that any drugs uncovered by dog sniffs only would be used for internal discipline but would not lead to criminal prosecutions.[293] During a schoolwide drug inspection, teachers confined students in their classrooms for two and one-half hours while an administrator or teacher, a dog and its handler, and a uniformed officer inspected each classroom.[294] Students sat at their desks with their hands, purses and bags on the desk top while the handler led the dog up and down the aisles.[295] The dog alerted to students on about fifty occasions, and after each alert, the student emptied her pockets or purse.[296] School officials subjected eleven students, including Doe, to a body search because the dog continued to alert after they emptied their pockets.[297] A school nurse conducted a strip search of Doe.[298] Doe did not possess any contraband; earlier that morning, she had played with her dog that was in heat[299]—one source of the false-positive alerts of which Justice Souter warned in *Caballes*.[300] As a result of a two and one-half hour detention and canine sniffs of 2,780 students, school officials disciplined seventeen students – a hit-rate of 0.006%.[301]

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[290] *See, e.g.*, B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1266 (9th Cir. 1999).

> In *Horton*, the Fifth Circuit noted that "the intensive smelling of people, even if done by dogs, [is] indecent and demeaning" and held that the sniffing by dogs of students was a search. The Fifth Circuit in *Horton* considered and expressly rejected the approach taken by the Seventh Circuit in *Doe v. Renfrow* . . . [on] facts nearly identical to those of *Horton*.

Id. (alteration in original) (internal citations omitted); *see also* Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313 (5th Cir. 1989) (upholding dog sniff of a car); Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981) (upholding canine sniff of student lockers).

[291] 475 F. Supp. 1012 (N.D. Ind. 1979). *See generally* Gardner, *supra* note 47 (analyzing Fourth Amendment implications of *Doe*).

[292] *Doe*, 475 F. Supp. at 1015-16. Beginning in fall 1978, school officials recorded nearly two-dozen instances in which students possessed drugs, paraphernalia, or alcohol. *Id.* at 1015. Thirteen of those twenty-one incidents occurred within four weeks prior to the search. *Id.* School officials and teachers became concerned that drug use in the school had a negative impact on the educational environment. *Id.* at 1016. Students under the influence of drugs disrupted classrooms, and faculty and student morale suffered. *Id.*

[293] *Id.*

[294] *Id.*

Doe sought § 1983 relief for violation of her constitutional rights.[302] *Doe* considered three substantive Fourth Amendment issues: 1) whether the use of dogs to find drugs constituted a search; 2) whether a dog's alert alone provided reasonable suspicion to search her person; and 3) whether the dog's alert provided reasonable grounds to conduct a nude search.[303] The Court in *Doe* first noted that schools extensively regulate students' movements and prolonged detention in classrooms did not constitute a search or seizure.[304] It characterized the use of canine teams in classrooms as a minimal intrusion—a brief interruption applied even-handedly to all students until a dog alerted. *Doe* emphasized the school's drug problem and concluded that "[u]se of the dogs to detect where those drugs were located was not unreasonable under the circumstances."[305] The dog alert, in turn, provided reasonable suspicion to search students' pockets and purses.[306] After school officials searched Doe unsuccessfully, they strip searched her, which the Court in *Doe* found unreasonable.[307] School officials had no facts—other than the dog's alert—to believe she had any drugs, but *Doe* held that only the nude search violated the Fourth Amendment. Despite the unreasonable search, the Court found that school officials acted in good faith, granted them qualified immunity, and summary judgment—the same result *Redding* reached three decades later.[308]

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[295] *Id.*

[296] *Id.* at 1017.

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] Illinois v. Caballes, 543 U.S. 405, 410 (2005) (Souter, J., dissenting).

[301] *Doe*, 475 F. Supp. at 1017 (noting that seventeen students possessed drugs—twelve voluntarily withdrew from school, three were expelled, and two were suspended).

[302] *See id.* at 1019.

[303] *Id.* at 1018.

[304] *Id.* at 1022 ("Any expectation of privacy necessarily diminishes in light of a student's constant supervision while in school. Because of the constant interaction among students, faculty and school administrators, a public school student cannot be said to enjoy any absolute expectation of privacy while in the classroom setting."); *accord* Florida v. Bostick, 501 U.S. 429 (1991) (arguing the plaintiff's presence on a bus, and not the police presence, constrained the plaintiff's freedom of movement); I.N.S. v. Delgado, 466 U.S. 210 (1984) (holding that conditions of employment, not immigration officers, restricted mobility).

Doe minimized the intrusiveness of dog sniffs of students and anticipated *Place* and *Caballes*'s rationale that contraband-specific canine detection is a "non-search." The paucity of people-sniffing cases and the abundance of cases challenging sniffs of luggage and cars suggest that dog sniffs of people rarely occur outside of schools.[309] Other courts on facts similar to *Doe* have concluded that a dog sniff of a person is more intrusive than sniffing inanimate objects and that school officials and police must have reasonable suspicion before deploying dogs against students.[310] The court in *Horton v. Goose Creek Independent School District* observed that:

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[305] *Doe*, 475 F. Supp. at 1021. Using language similar to *T.L.O.*'s, *Doe* focused on "(1) the student's age; (2) the student's history and record in school; (3) the seriousness and prevalence of the problem to which the search is directed; and (4) the exigency requiring an immediate warrantless search." *Id.* at 1024-25.

[306] *Id.* at 1024 ("[T]he alert of the dog constituted reasonable cause to believe that the plaintiff was concealing narcotics. Having that requisite reasonable cause to believe that the plaintiff was concealing narcotics, the defendants did not violate the plaintiff's Fourth Amendment rights by ordering her to empty her pockets onto the desk.").

[307] *Id.* The court reasoned that a strip search is

> [A]n intrusion into an individual's basic justifiable expectation of privacy. Before such a search can be performed, the school administrators must articulate some facts that provide a reasonable cause to believe the student possesses the contraband sought. The continued alert by the trained canine alone is insufficient to justify such a search because the animal reacts only to the scent or odor of the marijuana plant, not the substance itself.

Id.

[308] *Id.* at 1025-28.

[309] Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. CRIM. L. & CRIMINOLOGY 39 (1980); Martin R. Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 NW. U. L. REV. 803 (1980).

> "[T]he intensive smelling of people, even if done by dogs, [is] indecent and demeaning." Most persons in our society deliberately attempt not to expose the odors emanating from their bodies to public smell. . . . Intentional close proximity sniffing of the person is offensive whether the sniffer be canine or human. One can imagine the embarrassment which a young adolescent, already self-conscious about his or her body, might experience when a dog, being handled by a representative of the school administration, enters the classroom specifically for the purpose of sniffing the air around his or her person.[311]

Horton analogized a dog's sniff, close proximity, and occasional touching to a *Terry* frisk that required reasonable suspicion.[312] Although *Horton* found the sniff of students to be a search that required reasonable suspicion, it held that the use of dogs to sniff lockers and cars parked in public lots was not a search that required any factual predicate.[313]

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[310] Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 478-79 (5th Cir. 1982) (distinguishing sniffing inanimate objects such as bags, *United States v. Place*, 462 U.S. 696 (1983), from the greater intrusion on the person).

> We need only look at the record in this case to see how a dog's sniffing technique—*i.e.*, sniffing around each child, putting his nose *on* the child and scratching and manifesting other signs of excitement in the case of an alert—is intrusive. . . . [T]he dogs put their noses "up against" the persons they are investigating.
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> . . . [W]e hold that sniffing by dogs of the students' persons in the manner involved in this case is a search within the purview of the fourth amendment.

Id. at 479 (internal citations omitted).

[311] *Id.* at 478-79 (alteration in original) (citations omitted) (quoting Note, *supra* note 309).

[312] *Id.* at 479.

[313] *Id.* at 477 (concluding that "the use of the dogs' nose to ferret out the scent from inanimate objects in public places" is not a search and that "the sniffs of the lockers and cars did not constitute a search and therefore we need make no inquiry into the reasonableness of the sniffing of the lockers and automobiles").

In *B.C. v. Plumas Unified School District*, school officials required students to walk past a deputy sheriff and drug-sniffing dog stationed outside the classroom door.[314] School officials then ordered students to wait outside the classroom while the dog sniffed backpacks and jackets they left in the room.[315] *B.C.* concluded that close proximity sniffing of a person is offensive and infringes on a reasonable expectation of privacy.[316] Because the school did not face a serious drug problem and the search was more than minimally intrusive, the court required individualized suspicion, which officials lacked.[317] Notwithstanding the suspicionless search, *B.C.* denied relief in the student's § 1983 action because school officials acted in good faith and did not violate a "clearly established" constitutional right.[318]

Commonwealth v. Martin held that the greater intrusiveness of dog sniffs of students than cars and lockers required probable cause rather than reasonable suspicion.[319] Earlier, the Pennsylvania Supreme Court in *Commonwealth v. Johnston* interpreted the state constitution to find that a dog sniff of a storage locker or bag was a search and required reasonable suspicion.[320] *Johnston* balanced the intrusion of dogs on privacy in containers against the state interest in combating drugs and only required reasonable suspicion, rather than probable cause. *Johnston* justified the lower standard as a middle ground between federal law, which exempted dog sniffs from any Fourth

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[314] 192 F.3d 1260, 1263 (9th Cir. 1999).

[315] *Id.*

[316] *Id.* at 1266-67. The *Plumas* court noted that dog sniffs are "highly intrusive" for several reasons. *Id.* at 1267. "First, 'the body and its odors are highly personal.' Noting that dogs 'often engender irrational fear,' the district court further explained that the fact '[t]hat search was sudden and unannounced add[ed] to its potentially distressing, and thus invasive, character.' In addition, the 'search was completely involuntary.'" *Id.* (alterations in original) (internal citations omitted).

[317] *Id.* at 1268.

[318] *Id.* (granting school officials' qualified immunity defense because "[w]hen the dog sniff in this case occurred, it was not clearly established that the use of dogs to sniff students in a school setting constituted a search. As such, the unlawfulness of defendants' conduct 'in light of preexisting law,' was not 'apparent.'") (citation omitted).

[319] 626 A.2d 556 (Pa. 1993).

[320] 530 A.2d 74 (Pa. 1987).

Amendment scrutiny per *Caballes*, and a rigorous probable cause standard. *Martin* calibrated the greater intrusiveness of a sniff of a person than containers and required probable cause to use a dog.[321] Once police have probable cause to conduct a sniff, they may then detain a person for a reasonable time within which to obtain a warrant.[322] *Martin*'s rationale is consistent with Supreme Court decisions requiring probable cause to seize an object and to briefly hold it until police obtain a warrant to search it.[323] In contrast with the procedures adopted in *Martin*, *Doe*'s approval of unrestricted use of canines and *Horton* and *B.C.*'s minimal regulations do not adequately protect students' expectations of privacy in their persons.

b. Canine sniffs of students' cars in school parking lot.

Justice Ginsburg's dissent in *Caballes* warned that the Court "clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots."[324] In *Myers v. State*, police conducted a narcotics dog sniff of students' cars in the school parking lot.[325] Following the dog's alert to Myers's car, a school official searched it for drugs and recovered a gun. Charged with possessing a firearm on school property, Myers filed a motion to suppress evidence. The trial judge denied his motion to suppress and a sharply divided Indiana Supreme Court affirmed.[326]

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[321] *Martin*, 626 A.2d at 560. The court emphasized that:

> [A]n invasion of one's person is, in the usual case, [a] more severe intrusion on one's privacy interest than an invasion of one's property.
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> . . . [P]olice must have probable cause to believe that a canine search of a person will produce contraband or evidence of a crime. Reasonable suspicion of criminal activity will not suffice.

Id. at 560.

[322] *Id. Martin* distinguished between an allowable self-protective stop and frisk authorized by *Terry* and a search of the person.

[323] *See* Illinois v. McArthur, 531 U.S. 326 (2001) (allowing detention of resident while police obtain a warrant to search premises); United States v. Chadwick, 433 U.S. 1 (1977) (allowing seizure of footlocker based on probable cause but requiring search warrant to open it).

[324] Illinois v. Caballes, 543 U.S. 405, 422 (2005) (Ginsburg, J., dissenting).

[325] 839 N.E.2d 1154, 1159 (Ind. 2005).

[326] *Id.* at 1161.

The *Myers* majority emphasized that school officials enlisted the assistance of police and conducted the search.[327] Because Myers's car was parked in the school lot and unoccupied, the court relied on *Caballes* to uphold a canine sniff without individualized suspicion.[328] Although a search of a car ordinarily requires probable cause, the court relied on *Dilworth*'s tripartite framework, found that school officials did not formally act as agents of the police, and endorsed *T.L.O.*'s lower standard of reasonableness.[329] The majority concluded that:

> [S]chool officials, not the police, conducted the searches and that the police only assisted the school officials. The decision to conduct the sweep was made by the school and, although the time and date of the sweep was determined by the police, it was within a range of dates determined by the school; the areas to be searched were determined by the school; and the actual search was conducted by school officials. Because . . . the school initiated and conducted the search and sought only supporting police resources such as trained narcotics dogs that were not available to the school, we find that the propriety of the vehicle search under the Fourth Amendment is governed by the reasonableness test, not the warrant requirement.[330]

Myers reasoned that *Caballes* allowed a dog sniff of a car without any reason, found the dog's reaction provided reasonable suspicion for school officials to search the areas to which it alerted, and held that the search was reasonable.[331]

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[327] *Id.* at 1157.

> [I]t was the School who determined that the sweep would take place, where the sweep was to be conducted, and the range of time in which the sweep was to be conducted, further it was the School who did any search after the dog had alerted to a locker or vehicle.

Id. According to *Myers*, school officials were not acting as agents of the police. *Id.*

[328] *Id.* at 1159 (rejecting Myers's claim that "reasonable individualized suspicion was required by the federal constitution before officials could use a trained narcotics-detection dog to sniff the outside of the defendant's unoccupied motor vehicle").

[329] *See supra* notes 42-65 and accompanying text; *Myers*, 839 N.E.2d at 1160 ("[W]here a search is initiated and conducted by school officials alone, or where school officials initiate a search and police involvement is minimal, the reasonableness standard is applicable.").

[330] *Myers*, 839 N.E.2d at 1160.

In two separate dissents, justices would have excluded the evidence seized from Myers' car. Justice Sullivan objected to the majority's characterization of the search as one initiated by school officials when it involved officers descending "from four separate police departments without any advance notice and their vehicle-by-vehicle search of the cars in the parking lot."[332] Sullivan also objected to the majority's extension of *Caballes* from a contraband-specific dog sniff during a lawful traffic stop to a weapon search without any valid detention.[333] In a separate dissent, Justice Rucker urged the court to apply *Caballes*' rationale narrowly because no logical limitation existed to the majority's expansive reading.[334] Because police used the dogs to discover evidence for criminal prosecutions and not for school discipline, he would have required them to have reasonable suspicion, if not probable cause, to conduct a search with dogs, which they clearly lacked.[335]

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[331] *Id.* at 1160-61.

[332] *Id.* at 1162 (Sullivan, J., dissenting).

[333] *Id.*

[334] *Id.* at 1164 (Rucker, J., dissenting). Justice Rucker expressed concern that the majority's approval of the suspicionless dog-sniff in the parking lot expands the practice

> to a variety of contexts not specifically sanctioned by the *Caballes* court. Indeed, in a dissenting opinion Justice Souter made a similar point. Although complaining that the Court's stated reasoning "provides no apparent stopping point," Justice Souter pointed out that he did not believe the Court's [sic] was "actually signaling recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car . . . or on the person of any pedestrian minding his own business on a sidewalk."

Id. (quoting Illinois v. Caballes, 543 U.S. 405, 417 (2005) (Souter, J., dissenting)).

[335] *Id.* at 1164-66. Justice Rucker argued that:

> [B]efore an officer may subject a vehicle, lawfully parked in a parking lot, to a canine sniff, the officer must first have at least a reasonable articulable suspicion that a crime is being committed.
>
> . . . .
>
> . . . [B]ecause the school's drug prevention and detection policy was intended to (and did in fact) result in the seizure of evidence for law enforcement purposes, the traditional probable cause requirement was not waived. . . . "[W]here a law enforcement officer directs, participates or acquiesces in a

B. Drug testing Students without Individualized Suspicion

The majority in *T.L.O.* concluded that Choplick had reasonable suspicion to search the student's purse but suggested that other searches might be reasonable without any individualized suspicion.[336] Are there other types of *sui generis*, nonintrusive searches that school officials can perform without a warrant, probable cause, or even reasonable suspicion? May school officials invoke the epidemic of drug abuse—e.g., drugs' adverse impact on concentration, memory, academic performance, and associated problems of discipline and disruption—to create programs to detect and reduce drug use by students without any suspicion? When confronted with these questions, *Vernonia School District 47J v. Acton*[337] and *Board of Education v. Earls*[338] further watered down *T.L.O.*'s minimal threshold of individualized suspicion and upheld suspicionless drug testing of athletes and students who participate in extracurricular activities.[339]

In the late-1980s, Vernonia School District perceived a sharp increase in drug use, discipline problems, and classroom

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> search conducted by school officials, the officer must have probable cause for that search, even though the school officials acting alone are treated . . . to a lesser constitutional standard."

Id. (quoting A.J.M. v. State, 617 So. 2d 1137, 1138 (Fla. Dist. Ct. App. 1993).

[336] New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985).

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. . . . Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"

Id. (internal citation omitted) (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)); *see supra* note 141; Gardner, *supra* note 47, at 925-46 (criticizing *T.L.O.* for opening the door to suspicionless searches and posing hypotheticals realized in subsequent cases involving use of dogs, random urinalysis, and other departures from Fourth Amendment standards).

[337] 515 U.S. 646 (1995).

[338] 536 U.S. 822 (2002).

[339] *See, e.g.*, Irene Merker Rosenberg, *Public School Drug Testing: The Impact of* Acton, 33 AM. CRIM. L. REV. 349, 350 (1996) (characterizing *T.L.O.* as narrowing students' privacy rights and *Acton* as eliminating them).

disruptions and asserted that student-athletes were leaders of the school's drug culture.[340] After other efforts to deter drug use proved unsuccessful, it adopted a policy to require all students who participated in interscholastic athletics to consent to drug tests at the start of their sport's season and to submit to random testing thereafter.[341] The policy required students to provide a urine sample while monitored by same-sex school staff and an independent laboratory tested the sample for drugs.[342] The school barred seventh-grader James Acton from playing football because he and his parents refused to sign the consent form.[343] Acton claimed that the testing policy violated the Fourth Amendment and sought § 1983 declaratory and injunctive relief. The Ninth Circuit Court of Appeals agreed and invalidated the policy.[344]

A six-to-three majority of the Supreme Court reversed that decision and upheld the Vernonia School District's Policy. *Acton* employed a reasonableness balancing test and measured the intrusion on privacy interests against the promotion of legitimate governmental interests.[345] The Court noted that *T.L.O.* recognized schools' "special needs" and dispensed with traditional Fourth Amendment strictures.[346] It identified other in-

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[340] *Acton*, 515 U.S. at 649 (claiming that drug use adversely affected athletes' "motivation, memory, judgment, reaction, coordination, and performance" and increased the risk of sports-related injuries); *see* Michael D. Mosser, *Random Drug-Testing High School Student Athletes in* Vernonia School District 47J v. Acton*: Is the War on Drugs a Losing Battle for the Fourth Amendment?*, 17 WHITTIER L. REV. 527 (1996) (approving majority's balance in light of magnitude of school drug problem); Samantha Elizabeth Shutler, *Random, Suspicionless Drug Testing of High School Athletes*, 86 J. CRIM. L. & CRIMINOLOGY 1265, 1273-75 (1996) (analyzing context of Vernonia's drug problem and failures of alternative efforts to combat it).

[341] *Acton*, 515 U.S. at 649-50.

[342] *Id.* at 650.

[343] *Id.* at 651.

[344] *Id.* at 652.

[345] *Id.* at 652-53.

[346] *Id.* at 653. The Court noted that:

> A search unsupported by probable cause can be constitutional . . . "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."
>
> We have found such "special needs" to exist in the public school context. There, the warrant requirement "would unduly interfere with the mainten-

stances in which it had found that government's "special needs" required suspicionless drug testing.[347] *Acton* balanced the individual's privacy interests, the nature and degree of the intrusion on them, and the governmental interests and efficacy of the strategy to meet them.

In balancing these factors, the Court further minimized *T.L.O.*'s already meager recognition of students' privacy interests and emphasized their custodial relationship with school officials.[348] Even though *T.L.O.* recognized that school officials are state actors who do not simply act *in loco parentis*, *Acton* found that their "power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[349] To further diminish students' expectation of privacy, the Court emphasized school authorities' role to "'inculcate the habits and manners of civility,'" emphasized their "custodial and tutelary responsibility for children," and noted that schools already subject students to physical examinations and vaccination requirements.[350] The majority insisted that student athletes "volunteer" for greater regulation and supervision than do ordinary students[351] and asserted that school

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> ance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools."

Id. (citation omitted) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)).

[347] *Id.* (noting the Court's approval of suspicionless "drug testing of railroad personnel involved in train accidents" and "random drug testing of federal customs officers who carry arms or are involved in drug interdiction . . . .") (citations omitted); *see infra* notes 355-56, 358 and accompanying text.

[348] *Id.* at 654 (noting that "the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster").

[349] *Id.* at 655.

[350] *Id.* at 655-56 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)).

[351] *Id.* at 657 ("[Student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. . . . [S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.").

locker rooms and showers provide no privacy.[352] The Court emphasized the minimal intrusion associated with collecting a urine sample—conditions "nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily."[353] The Court emphasized that the laboratories only tested the samples for undisclosed drugs, the school restricted personnel's access to results, and it did not use positive test results for either law enforcement or internal disciplinary purposes.[354]

On the other side of the balance, the Court found a compelling governmental interest to deter drug use by student-athletes. *Acton* invoked the Court's earlier decisions in *Skinner v. Railway Labor Executives' Association*[355] and *National Treasury Employees Union v. Von Raab*[356] which upheld suspicionless drug testing for "closely-regulated" employees. Both *Skinner* and *Von Raab* found a "compelling need" to conduct drug tests without individualized suspicion because of the government's "special needs" to investigate railroad accidents and to assure unimpaired integrity of armed, drug-interdiction customs agents.[357] *Acton* equated the "compelling state interest" to enhance drug enforcement by armed customs agents and to prevent accidents by railroad engineers with a "legitimate need" to deter student drug use.[358]

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[352] *Id.* ("[Athletic participation] require[s] 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms . . . are not notable for the privacy they afford.").

[353] *Id.* at 658 (emphasizing that school staff collected urine samples from fully-clothed students under conditions similar to those in which students ordinarily used bathrooms).

[354] *Id.*

[355] 489 U.S. 602 (1989). The Court ruled that Federal Railroad Administration regulations requiring drug and alcohol testing of railroad employees involved in accidents without a warrant or reasonable suspicion were reasonable under the Fourth Amendment because of the compelling governmental interest in assuring security in "safety-sensitive tasks" and the balance of public and private interests involved.

> The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operations of a government office, school, or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements."'

Id. at 620 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987)). By contrast, railroad employee's expectations of privacy are substantially diminished by virtue of their "participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Id.* at 627. Finally, the Court found a compelling governmental interest to testing without a showing of individualized suspicion because "[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 628.

[356] 489 U.S. 656 (1989). The Court upheld the United States Customs Service employee drug-testing program which did not require individualized suspicion when employees applied for promotion to positions involving interdiction of illegal drugs or which required them to carry firearms. *Id.* In addition to the governmental interest in

> School years are the time when the physical, psychological, and addictive effects of drugs are most severe. . . . And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. . . . Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened [for] . . . pose substantial physical risks to athletes.[359]

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detecting drug use among customs employees, the Court emphasized a "compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 670. The Court noted that the military subjects personnel to intrusive inquiries into their physical fitness and conducts routine searches of employees of the U.S. Mint when they leave the workplace. *Id.* at 671. Similarly, customs enforcement officers have a reduced expectation of privacy because:

> [E]mployees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.

Id. at 672.

[357] *See supra* notes 355-56.

[358] *See, e.g.*, Shutler, *supra* note 340, at 192-93 (criticizing Court for conflating "compelling" and "legitimate" state interests to justify search).

[359] *Acton*, 515 U.S. at 661-62 (alteration in original).

Acton emphasized the drug problem confronted by the School District and student-athletes' role as leaders of the drug-culture.[360] It insisted that a search could be reasonable even if the District did not use the "least restrictive" method available—i.e., searches based on individualized suspicion—to achieve its goals.[361] It rejected *T.L.O.*'s requirement of reasonable suspicion to search as impractical, accusatory—"a badge of shame"—and counter-productive.[362] The Court concluded that "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."[363]

Justice O'Connor dissented from *Acton*'s approval of suspicionless drug testing of student-athletes and insisted that "mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth

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[360] *Id.* at 663 ("[A] drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.").

[361] *Id.* ("refus[ing] to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment").

[362] *Id.* at 663-64. The Court reasoned that suspicion-based drug testing was impractical because

> [P]arents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.

Id. (citations omitted).

[363] *Id.* at 665. Justice Ginsburg concurred with the Court's conclusion that the "drug-testing policy applies only to students who voluntarily participate in interscholastic athletics," *id.* at 666 (Ginsburg, J., concurring), but expressed reservations as to whether a school could impose routine drug testing on all students. *See infra* notes 376-83 and accompanying text, in which Justice Ginsburg wrote the dissenting opinion in *Board of Education v. Earls*, 536 U.S. 822 (2002). The majority in *Earls* approved more extensive drug testing. *See infra* notes 375-79 and accompanying text.

Amendment."[364] While the majority assumed that random testing avoided arbitrary or accusatory selection,[365] Justice O'Connor argued that requiring individualized suspicion enabled potential targets to avoid a search altogether by not engaging in suspicious behavior.[366] She emphasized that previous decisions dispensed with individualized suspicion only when minimally intrusive and conducted in unique contexts such as closely-regulated businesses or prisons.[367] She challenged the majority's conclusion that a requirement of individualized suspicion would be impractical, accusatory, and counterproductive.[368] Teachers and coaches constantly monitor students and readily can observe suspicious behavior.[369] Most of the incidents on which the Vernonia School District relied to justify random testing would have furnished officials with reasonable suspicion to conduct drug tests under *T.L.O.*[370] The *Acton* majority emphasized the impracticality of a suspicion-based regime and asserted that parents who would accept random testing of all athletes would reject "accusatory drug testing . . . [that] transforms the process into a badge of shame."[371] However, if school officials possess reasonable suspicion under *T.L.O.*, then parental acceptance is irrelevant to their authority to search. As an additional reason to reject individualized suspicion, the majority expressed concern that "teachers will impose testing arbitrarily upon troublesome but not drug-likely students."[372] *T.L.O.* required reasonable suspicion as a prerequisite to a valid search, and if teachers "arbitrarily" test troublesome students, then their conduct should be subject to administrative and judicial review. In short, focusing on disruptive student behavior would provide a better indicator of drug use and substantially reduce the number of young people tested than the undifferentiated blanket policy endorsed by the majority.[373]

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[364] *Acton*, 515 U.S. at 667 (O'Connor, J., dissenting). O'Connor was joined by Justices Stevens and Souter. *Id.* at 666.

[365] *Id.* at 667 (criticizing the Court's rationale to dispense with individualized suspicion on policy grounds). "First, it explains that precisely because *every* student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing who to test. Second, a broad-based search regime, the Court reasons, dilutes the accusatory nature of the search." *Id.* (emphasis in original).

[366] *Id.* A requirement of individualized suspicion

> afford[s] potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of such a regime, one would think, are minimal.

Id.

[367] *Id.* at 673. Moreover, *T.L.O.* explicitly rejected the analogy between schools and prison. New Jersey v. T.L.O., 469 U.S. 325, 338-39 (1985). "We are not yet ready to hold that the schools and prisons need to be equated for purposes of the Fourth Amendment." *Id.*

[368] *Acton*, 515 U.S. at 669-76 (O'Connor, J., dissenting).

[369] *Id.* at 678 ("[N]owhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms.") (emphasis in original).

[370] Rosenberg, *supra* note 339, at 358 (criticizing majority for failing to analyze whether an "individualized suspicion requirement would be ineffectual or impractical").

Although *Acton* focused narrowly on student-athletes who posed a significant risk of drug-impaired physical injury to themselves or others, commentators noted that its rationale could extend more broadly.[374] In *Board of Education of Inde-*

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[371] *Acton*, 515 U.S. at 663.

[372] *Id.* The majority decried the "expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed." *Id.* at 663-64.

[373] *Id.* at 685-86 (O'Connor, J., dissenting). Justice O'Connor argued that the more reasonable school policy would

> focus on the class of students found to have violated published school rules against severe disruption in class and around campus—disruption that had a strong nexus to drug use . . . . Such a choice would share two of the virtues of a suspicion-based regime: testing dramatically fewer students, tens as against hundreds, and giving students control, through their behavior, over the likelihood that they would be tested.

Id. (citation omitted). *See* Shutler, *supra* note 340, at 1294-95 (questioning scope of drug problems among athletes, whether deterring their drug use would also deter use among non-athletes, whether testing would deter athletes, and asserting a negative impact on the relationship between athletes and coaches).

[374] *See, e.g.*, Carla E. Laszewski, *Gone to Pot: Student Athletes' Fourth Amendment Rights After* Vernonia School District 47J v. Acton, 40 ST. LOUIS U. L.J. 575, 610 (1996):

> While the decision directly pertains to student athletes, the possibility of wider application both in and out of the school setting exists. The Court finds all students have a decreased expectation of privacy in school. That fact coupled with the Court's preference for suspicionless testing because of the

pendent School District No. 92 of Pottawatomie County v. Earls a five-to-four majority of the Court approved a policy to place all students participating in extracurricular activities—e.g., debate, chess club, dramatics, band, choir, Future Farmers and Future Homemakers of America, and the like—in the drug-testing pool.[375] The *Earls* majority emphasized schools' "special needs," applied *Acton*'s balancing test, and upheld the testing program. Even though the School District conceded it did not confront a significant drug problem, Justice Thomas minimized students' privacy interests and emphasized the school's responsibility to maintain discipline, health, and safety.[376] Regardless of whether an extracurricular activity required a physical examination or communal undress, Thomas insisted that participating students "volunteered" for more extensive regulation which further diminished expectations of privacy.[377] Expanding *Acton*'s safety rationale, *Earls* asserted that illegal drug use

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> "badge of shame" associated with a suspicion-based testing procedure, suggests other students could be subject to suspicionless testing.

Id.; *see also*, John J. Bursch, Note, *The 4 R's of Drug Testing in Public Schools: Random Is Reasonable and Rights Are Reduced*, 80 MINN. L. REV. 1221, 1251 (1996) (arguing for random drug testing of entire student body because "the state's important interest and the test's minimal instrusiveness still should outweigh the students' expectation of privacy" and because it avoids the Court's concern about discriminatory selection); Mosser, *supra* note 340 (agreeing that random drug testing constitutes appropriate policy as confined to student athletes); Rosenberg, *supra* note 339, at 366-71 (cautioning that only one of *Acton*'s four rationales confined the decision to student athletes); Shutler, *supra* note 340, at 1295 (insisting that *Vernonia* disregarded Fourth Amendment principles by finding the school district's interests "to be 'compelling' given the paucity of the evidence of athletes using drugs; and second, by holding that student athletes have diminished privacy expectations solely due to the structure and requirements of the athletic program").

[375] 536 U.S. 822 (2002); *see also* Todd v. Rush Cnty. Sch., 133 F.3d 984, 984 (7th Cir. 1998) (relying on *Vernonia* and anticipating *Earls* by approving school district policy of random testing students "participating in any extracurricular activities or driving to and from school"); Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 826 A.2d 624 (N.J. 2003) (extending scope of student activities subject to random testing to students' use of school parking lot for their cars).

[376] *Earls*, 536 U.S. at 834 (suggesting that the "nationwide drug epidemic makes the war against drugs a pressing concern in every school," regardless of the magnitude of the problem in any given school).

[377] *Id.* at 831 ("[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes.").

per se posed a threat to students' health and welfare and justified broad application of the testing program.[378] The Court concluded that suspicionless testing reasonably furthered the School District's legitimate goal to deter and detect drug use.[379]

Four justices dissented and objected that *Earls* jettisoned *Acton*'s "special needs" rationale which emphasized both the school's acute drug problem and safety concerns for student athletes.[380] The only commonality between *Acton* and *Earls* was the latter's conclusion that drug use posed a threat to all students and they voluntarily participated in extracurricular activities. The dissent readily distinguished between the risks associated with competitive school sports and those confronted by participants in band, choir, and Future Farmers of America.[381] Justice Ginsburg also questioned whether students "volunteered" to participate in many extracurricular activities and contended that they simply extended the educational opportunities schools provide.[382] The dissent also objected that the testing policy targeted the wrong group of students at risk and discouraged other students from participating in extracurricular activities.[383]

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[378] *Id.* at 836-37 ("[T]he safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose."). Commentators objected that the health and safety rationale of *Earls* could support mandatory random testing of all high school students. *See* Marcus Raymond, *Drug Testing Those Crazy Chess Club Kids: The Supreme Court Turns Away from the One Clear Path in the Maze of "Special Needs" Jurisprudence in* Board of Education v. Earls, 22 ST. LOUIS U. PUB. L. REV. 559, 589 (2003). Raymond argues that instead of emphasizing the specific context as in *Vernonia* to limit drug testing to athletes, *Earls* "changed the context by redefining the relationship between the student and the school, leading to the allowance of drug testing students as a class. By doing so, the Court has laid the framework for a future in which all students may be forced to submit to drug tests." *Id.*; *see also* Irene Merker Rosenberg, *The Public Schools Have a "Special Need" for Their Students' Urine*, 31 HOFSTRA L. REV. 303, 315 (2002). If the special context of competitive athletics is irrelevant, then:

> The health of *all* children seems to be what is important, no matter how unstrenuous the activities in which they engage. Quarterbacks and chess club members are equal in that regard and if so, it is no small leap from that to all students, whether involved in extracurricular activities or not. After all, students could be injured during gym class or while running past each other in the halls.

Id.

[379] *Earls*, 536 U.S. at 837 ("[T]he Fourth Amendment does not require a finding of individualized suspicion and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students."); *see* Christopher A. Gorman, *Public School Students' Fourth Amendment Rights After* Vernonia *and* Earls*: Why Limits Must Be Set On Suspicionless Drug Screening in the Public Schools*, 29 VT. L. REV. 147, 162-63 (2004) (criticizing the Court for conflating the privacy interests of student athletes with those who participate in other extracurricular activities).

[380] *Earls,* 536 U.S. at 843 (Ginsburg, J., dissenting) (insisting that Vernonia "emphasized that drug use 'increase[d] the risk of sports-related injury' and that Vernonia's athletes were the 'leaders' of an aggressive local 'drug culture' that had reached 'epidemic proportions.'" (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995))).

Both *Acton* and *Earls* minimized students' privacy interests, emphasized schools' "custodial and tutelary responsibilities," and decried the hazards of drug use. The School District in *Doe v. Little Rock School District*[384] invoked that logic to conduct random, suspicionless searches of *all* students' persons and belongings. It regularly ordered students to leave the classroom after emptying their pockets and placing their possessions, backpacks and purses on their desks.[385] While students waited outside, personnel searched the items left in the classroom for weapons and contraband.[386] School officials found marijuana in Doe's purse,[387] turned it over to police, and she was convicted of a misdemeanor.[388] She claimed that the search violated her Fourth Amendment rights and sought declaratory and injunctive relief under § 1983.[389] The District Court relied on *Acton* and *Earls* and dismissed her complaint with prejudice finding no violation of her rights and providing no remedies.[390] The Eighth Circuit Court of Appeals found that the search violated the Fourth Amendment and reversed that ruling.[391] *Doe* distinguished between random searches imposed on the entire student body and those in *Acton* and *Earls* in which students volunteered to participate in extracurricular activities and waived their privacy expectations.[392] *Doe* emphasized that the school's goal to discover potential weapons or drugs did not completely obliterate students' privacy interests in their personal belongings.[393] It observed that *Acton* and *Earls* only used information gleaned from testing to regulate participation in extracurricular activities and did not use it for internal discipline or disclose it to police.[394] Finally, *Doe* characterized the reasonableness balance as a sliding scale—degree of privacy intrusion weighed against compelling governmental interest—and found nothing in the record to indicate that the School District confronted a significant weapon or drug problem.[395] In short, *T.L.O.* provides limited protection for students' personal property, but none for bodily fluids.

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[381] *Id.* at 852 (distinguishing between competitive athletics and contact sports and the activities affected in *Earls*). "Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree." *Id.*

[382] *Id.* at 845-46 ("Participation in [extracurricular] activities is . . . essential in reality for students applying to college . . . . Students 'volunteer' for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them.")' *see also* Roseann Kitson, *High School Students, You're in Trouble: How the Seventh Circuit Has Expanded the Scope of Permissible Suspicionless Searches in Public Schools*, 1999 WIS. L. REV. 851, 881 (arguing that participation in extracurricular activities is not a "privilege" or purely voluntary because of "the ubiquitous nature of extracurricular activities in secondary education and the encouragement of such participation by admissions requirements of many colleges and universities"); Gorman, *supra* note 379, at 164 ("[E]xtracurricular involvement has become indispensable to the overall educational experience of many students. Extracurricular activities provide 'marginal' students with an incentive to remain in school. Involvement in extracurricular activities has also become essential for all college-bound students.").

[383] *Earls*, 536 U.S. at 853. The Court emphasized that students who engage in extracurricular activities develop substance abuse problems significantly less frequently than do those who do not participate:

> Even if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use. Tecumseh's policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.

Id.; *see, e.g.*, Raymond, *supra* note 378 (noting that extracurricular activities promote prosocial values and keep youths busy and less likely to engage in risky behaviors).

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[384] 380 F.3d 349 (8th Cir. 2004).

[385] *Id.* at 351.

[386] *Id.*

[387] *Id.*

[388] Doe v. Little Rock Sch. Dist., 2003 WL 24054462, at *1 (E.D. Ark. 2003).

[389] *Doe*, 380 F.3d at 351.

[390] *Doe*, 2003 WL 24054462, at *2-3.

[391] *Doe*, 380 F.3d at 351-52 (holding the search unconstitutional "[b]ecause subjecting students to full-scale suspicionless searches eliminates virtually all of their privacy in their belongings").

[392] *Id.* at 354. The Court emphasized that:

> By consciously choosing to 'go out for the team' or other competitive extracurricular endeavor, such students agree to waive certain privacy expectations that they would otherwise have as students in exchange for the privilege of participating in the activity. But the search regime at issue here is imposed upon the entire student body, so the LRSD [Little Rock School District] cannot reasonably claim that those subject to search have made a voluntary tradeoff of some of their privacy interests in exchange for a benefit or privilege.

Id.

Despite *Acton* and *Earls*' denigration of students' privacy interests and approval of suspicionless drug testing, some lower courts have shown greater respect for Fourth Amendment values.[396] In *Theodore v. Delaware Valley School District*,[397] the

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[393] *Id.*

[394] *Id.* at 355 ("[T]he fruits of the searches at issue here are apparently regularly turned over to law enforcement officials and are used in criminal proceedings against students whose contraband is discovered.").

[395] *Id.* at 356 (distinguishing the court's earlier ruling in *Thompson v. Carthage School District*, in which it upheld "a single 'generalized but minimally intrusive search'" based on particularized evidence that knives and/or guns were present at school that morning (quoting Thompson v. Carthage Sch. Dist., 87 F.3d 979, 983 (8th Cir. 1996))).

[396] In *Brannum v. Overton County School Board*, the court confronted students' "reasonable expectations of privacy" after school officials installed video surveillance cameras to improve security throughout the school including in the boys' and girls' locker rooms. 516 F.3d 489 (6th Cir. 2008). The cameras transmitted images to a computer in the assistant principal's office where they were displayed and stored. *Id.* at 492. School officials could access those images via remote internet connection. *Id.* Members of a visiting basketball team noticed the camera in the girls' locker room and notified their coach who reported the camera to her school principal. *Id.* The camera recorded images of girls in their bras and panties when they changed clothes. *Id.* at 493. Students sued school officials under 42 U.S.C. § 1983, alleging that they violated their constitutional right to privacy by installing and operating video surveillance equipment in the boys' and girls' locker rooms and by viewing and retaining the recorded images. *Id.* at 494. The court concluded that videotaping "such intimate, personal activity" violated the students' reasonable expectation of privacy. *Id.* The court initially concluded that the installation of the surveillance cameras was justified at its inception by legitimate security concerns. *Id.* at 496. "[T]he policy of setting up video surveillance equipment throughout the school was instituted for the sake of increasing security, which is an appropriate and common sense purpose and not one subject to our judicial veto." *Id.* The court balanced the *T.L.O.* and *Vernonia* factors—"the students' reasonable expectations of privacy, the nature of the intrusion, and the severity of the school officials' need in enacting such policies, including particularly, any history of injurious

Pennsylvania Supreme Court interpreted the state constitution to require a more particularized showing by the School District of the need to conduct random drug tests.[398] The court's state constitutional test balanced four factors: (1) students' privacy interests, (2) the nature of the intrusion created by the search, (3) notice, and (4) the purpose to be achieved by the search and the immediate reasons prompting the decision to search.[399] In

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behavior that could reasonably suggest the need for the challenged intrusion." *Id.* (citing Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005)). Even though *Vernonia* relied, in part, on students' lower level of privacy in school locker rooms, *Brannum* concluded students could not reasonably expect that school administrators would videotape them while they undressed and changed clothes for an athletic activity. *Id.* "Video surveillance is inherently intrusive. . . . [T]he school officials wholly failed to institute any policies designed to protect the privacy of the students and did not even advise the students or their parents that students were being videotaped." *Id.* at 496-97. The court distinguished between video surveillance and students' expectations of privacy in schools' public spaces—e.g., hallways, cafeterias, and other places in which students mingle—and those specifically set aside to provide privacy—e.g., dressing and undressing in locker rooms. *Id.* at 498. In the absence of evidence demonstrating concerns about safety and security in the locker room—i.e., previous misconduct or a threat of future wrong-doing—the court found the installation of surveillance cameras in a place of heightened privacy to be a disproportionate response that violated students' reasonable expectation of privacy. *Id.* Significantly, the court denied school officials the protection of qualified immunity. *Id.* at 500. Notwithstanding a reluctance to inhibit officials' exercise of broad discretion to carry out their duties without fear of personal liability, the court found the surveillance policy violated a "clearly established" constitutional right, despite a clear prior court decision.

> Some personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government invasion. Surreptitiously videotaping the plaintiffs in various states of undress is plainly among them. Stated differently, and more specifically, a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room.

Id. at 499.

[397] 836 A.2d 76 (Pa. 2003).

[398] *Id.* at 88. The court noted that "the unique policy concerns safeguarding the individual right to privacy in Pennsylvania bring a greater degree of scrutiny to all searches where the protection of Article 1, Section 8 is invoked" and that it "mandate[s] greater scrutiny in the school environment." *Id.* (quoting *In re* F.B., 726 A.2d 361, 365 (Pa. 1999)).

[399] *Id.* at 88.

contrast with *Acton* and *Earls*, *Theodore* noted that "the students' privacy rights here—rights which were rather summarily dismissed by *Earls*—have greater meaning under Article I, Section 8, [and] the testing authorized by the District cannot be viewed as a trivial incursion on privacy."[400] While *Theodore* acknowledged the need to deter drug use, it analyzed the efficacy and reasonableness of selecting the targeted students for testing.[401] *Theodore* concluded that the School District failed to demonstrate that an actual drug problem existed, that the policy actually targeted students likely to be involved, or that the policy was reasonably tailored to address whatever drug problem existed.[402]

The Washington Supreme Court in *York v. Wahkiakum School District No. 200*, interpreted a provision of the state constitution to give student athletes greater protection than *Acton* and *Earls* granted under the Fourth Amendment.[403] *York*'s analysis considered whether the state's action to require a urine sample disturbed his privacy and whether that intrusion was justified.[404] Notwithstanding student athletes' greater regulation and reduced privacy in the locker room, *York* viewed collecting urine samples as a significant intrusion on privacy.[405] *York* rejected the state's claim that schools confronted unique circumstances and declined to adopt *Acton*'s "special needs" exception in its interpretation of the state constitution.[406] *York* feared that the "special needs" exception provided no basis on which "to draw a principled line permitting drug testing only student athletes. If we were to allow random drug testing here, what prevents school districts from either later drug testing students participating in any extracurricular activities, as federal courts now allow, or testing the entire student population?"[407]

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[400] *Id.* at 88, 90.

[401] *Id.* at 92 ("Although we do not for a moment downplay the seriousness of student use of drugs and alcohol, in this post-Columbine High School era otherwise-undetected alcohol and drug use by some students does not present the same sort of immediate and serious danger that is presented when students introduce weapons into schools.").

[402] *Id.* at 93.

[403] 178 P.3d 995 (Wash. 2008); WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

[404] 178 P.3d at 998-99.

[405] *Id.* at 1006.

[406] *Id.* at 1005.

School administrators and the *Acton* and *Earls* majorities apparently believe that random testing deters drug use. By contrast, Justice Ginsburg's dissent in *Earls* and the Pennsylvania court in *Theodore* question the efficacy of random—as opposed to suspicion-based—drug testing as a strategy to prevent student drug use. Whether an intrusion on privacy is reasonable depends, in part, on whether it is likely to achieve its goal and actually reduce drug use. An empirical study examined which schools used drug tests, how they selected students to test, and the relationship between drug testing and student drug use.[408] Drug testing is expensive and costs escalate quickly for schools with larger student bodies and which test significant samples of participants in extracurricular activities.[409] A small minority of schools administered drug tests, and they most often tested students for whom individualized suspicion of use or impairment existed.[410] A survey of school principals in wealthy communities and "troubled" neighborhoods reported that they were less likely to use random drug tests than those in midrange schools were.[411] Regardless of school size and socioeconomic status (SES), random drug testing did not affect students' drug use. "[S]chool drug testing was not associated with either the prevalence or the frequency of student marijuana use, or of other illicit drug use. Nor was drug testing of athletes associated with lower-than-average marijuana and other illicit drug use by high school male athletes."[412] In addition to apparent ineffectiveness and costs, random testing risks alienating students and parents, and produces collateral consequences with false-positive test results. By eschewing individualized suspicion, *Acton* and *Earls* minimized students' privacy interests, denied them any right to autonomy or bodily integrity, expanded the scope of government power beyond any reasonable bounds, and produced no positive results.[413]

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[407] *Id.* at 1006.

[408] *See* Ryoko Yamaguchi, Lloyd D. Johnston & Patrick M. O'Malley, *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159 (2003) (collecting data on adolescent drug use from self-administered questionnaires given to nationally representative samples of students in grades 8, 10, and 12 and obtaining information on school characteristics, including drug-testing policies from school administrators and analyzing trends between 1998 and 2001).

[409] *Id.* at 159 ("A single standard drug test to detect marijuana, tobacco, cocaine, heroin, opiates, amphetamines, barbiturates, and tranquilizers can range from $14 to $30 per test, while a test for steroid use costs $100 per test.").

[410] *Id.* at 161-62 (noting that less than one-fifth of schools (18%) reported administering drug tests and "students suspected of using drugs were most likely to be tested, with 14.04% of schools testing such students . . . for cause and suspicion").

[411] *See* Cynthia Kelly Conlon, *Urineschool: A Study of the Impact of the* Earls *Decision on High School Random Drug Testing Policies*, 32 J.L. & EDUC. 297 (2003) (surveying school principals' reactions to *Earls* and the school characteristics that influenced their decision whether or not to adopt random drug testing of students.) The principals who declined to implement random drug testing emphasized "the difficulty of getting support from all members of the community (especially student support), cost, and the problems with preserving confidentiality and maintaining student trust." *Id.* at 309. Conlon examined the relationship between "school functioning"—parental involvement,

IV. SEARCH RELATED IN SCOPE TO THE JUSTIFICATION: LOCKERS AND DESKS, CARS, AND STRIP SEARCHES

T.L.O. held that a search must be "justified at its inception" by particularized suspicion and "reasonably related in scope to the circumstances which justified the interference in

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instructional expenditures per pupil, truancy rate, and average ACT score—principals' decision whether or not to adopt a random drug-testing policy. *Id.* at 316. In wealthy school districts, "parents don't want to subject their children to testing that they perceive could have negative consequences. . . . [T]hese parents have the political clout to control policy in their districts and block efforts to institute random drug testing." *Id.* at 317. By contrast, in "troubled" schools with limited funds, chronic truancy, and academic under-achievement issues, principals have more pressing priorities than instituting random drug testing, even if parents lack the political clout or energy to oppose such a policy. *Id.* "It is in the mid-level districts, where schools have adequate funding but parents are not as involved, that principals who support random drug testing have the political maneuverability to make it happen." *Id.* at 319.

[412] Yamaguchi, *supra* note 408, at 164; *see also* Conlon, *supra* note 411, at 319 (noting that some principals conduct suspicionless testing despite an "absence of data to show that random drug testing actually deters student drug use. Although intuition may suggest that testing will be a deterrent, little research has been conducted to find out if this is so.").

[413] *See, e.g.*, Rosenberg, *supra* note 339, at 377-78 (arguing that suspicionless drug testing adversely affects "the students' autonomy and sense of bodily integrity, their sense of fairness, and the limits of governmental power. It is not only children's bodies but also their minds and emotions that are affected by programs of this sort.").

the first place."[414] *T.L.O.* recognized that students bring legitimate non-contraband items to school and do not waive their expectation of privacy in those personal objects—purses, outerwear, backpacks, and the like. Because *T.L.O.* found that Choplick had reasonable suspicion to search the student's purse, the Court declined to speculate on students' expectation of privacy in their "lockers, desks, or other school property provided for the storage of school supplies."[415] Courts have struggled to define students' legitimate expectation of privacy in lockers and desks provided by the school.[416] Do authorities require reasonable suspicion to open those containers? Even if authorities may open school lockers provided for students' convenience, may they inspect the contents of those lockers—e.g., squeeze jackets or backpacks, or open them for inspection—without individualized suspicion?[417] When students park their cars in school parking lots, may school officials search those cars under *T.L.O.*'s reasonable suspicion standard or must they possess the probable cause required to search an automobile? Finally, *Redding* confronted an intrusive strip search and required particularized justification. What factual justifications have lower courts required when public officials strip search young people?

A. Searches of Desks and Lockers

A few lower courts have held that students have a reasonable expectation of privacy in their lockers and that school authorities must have reasonable suspicion to open them and search them for contraband.[418] They reason that if students have a reasonable expectation of privacy in their personal items, it should not dissipate if they place them in a school locker.[419]

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[414] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[415] *Id.* at 337 n.5.

[416] *See* S.C. v. State, 583 So. 2d 188 (Miss. 1991); *In re* Dumas, 515 A.2d 984 (Pa. 1986) (applying *T.L.O.* standards to searches of lockers); Commonwealth v. Cass, 666 A.2d 313 (Pa. Super. Ct. 1995) (expectation of privacy in school locker); State v. Joseph T., 336 S.E.2d 728 (W. Va. 1985).

[417] *See, e.g.*, Minnesota v. Dickerson, 508 U.S. 366 (1993) (holding that squeezing and manipulating an object to determine its contents constituted a search).

[418] *See supra* note 416 and accompanying text.

To avoid this problem, some states have adopted statutes that provide that school authorities may inspect students' lockers "for any reason at any time, without notice, without student consent, and without a search warrant."[420] If state law provides that lockers remain under the exclusive control of the school and subject to search without any justification, then students can claim no reasonable expectation of privacy in them.[421] Even without explicit legislation, school authorities may promulgate a locker search policy that renders any expectation of privacy unreasonable.[422] In *In re Isiah B.*, the school principal received reports from staff and security personnel that guns were present at school.[423] The principal ordered a search of student lockers; aides searched about seventy-five to one hundred lockers and found a gun and cocaine in Isiah B.'s locker.[424] Although Isiah B. challenged the search for lack of individualized suspicion, the Wisconsin Supreme Court relied on a school policy advising students that they had "no expectation of privacy" in their lockers and denied his motion to suppress evidence. The court held that "[s]chool administrators may adopt a locker policy retaining ownership and possessory control of school lockers and give notice of that policy to students. Because Isiah B. had no reasonable expectation of privacy in his locker, there was no Fourth Amendment violation."[425]

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[419] *Cass*, 666 A.2d at 317 ("[A] student's expectation of privacy in a jacket or purse was not lost merely because the student placed the jacket or purse in his or her locker." (citing *In re Dumas*, 515 A.2d at 985)).

[420] MINN. STAT. ANN. § 121A.72 subdiv. 1 (West 2008).

[421] *See* ALASKA STAT. §§ 14.03.105, 14.45.190 (2008); ARK. CODE ANN. § 6-21-608 (2007); CONN. GEN. STAT. ANN. § 54–33n (West 2009); FLA. STAT. ANN. § 232.256 (West 1998); IOWA CODE ANN. § 808A.2 (West 2003); N.J. STAT. ANN. § 18A:36–19.2 (West 1999); OHIO REV. CODE ANN. § 3313.20 (LexisNexis 2009); VA. CODE ANN. § 22.1–277.01:2 (2006) (repealed 2001).

[422] *See* Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981) (concluding that school had joint control of locker and enjoyed right to inspect it); *In re* Isiah B., 500 N.W.2d 637 (Wisc. 1993) (holding that random search of student's locker was justified because school had policy allowing for searches of lockers for any reason).

[423] 500 N.W.2d at 638.

[424] *Id.* at 639.

[425] *Id.* at 641.

Although statutes or school handbooks may allow school officials to open a student's locker, what may they do with a jacket or backpack stored within the locker? Do they need reasonable suspicion to feel coats, squeeze backpacks, or open briefcases or other closed containers within the locker? In *Minnesota v. Dickerson*, the Court held that after an officer conducted a *Terry* frisk and found no weapon, any subsequent "squeezing, sliding and otherwise manipulating the outside of the defendant's pocket" constituted a search in violation of the Fourth Amendment.[426] Statutes that authorize suspicionless inspection of school lockers recognize students' residual privacy interests in their personal contents.[427] Courts have found that students retain a privacy interest in their personal items even when they store them in lockers. "We are unable to conclude that a student would have an expectation of privacy in a purse or jacket which the student takes to school but would lose that expectation of privacy merely by placing the purse or jacket in school locker provided to the student for storage of personal items."[428]

In *State v. Jones*, the Iowa Supreme Court analyzed students' expectation of privacy in their lockers and contents.[429] Prior to winter break, school staff planned to inspect and clean out lockers to ensure health and safety, to remove trash and food, to retrieve overdue library books, and to find weapons and controlled substances.[430] They notified students to report to their locker at assigned times to open them for inspection.[431] About twenty percent of students, including Jones, did not report to their lockers at the designated time. Two aides opened lockers that had not been inspected and found a blue nylon coat hanging in Jones's locker.[432] One aide manipulated the coat and discovered a small bag of marijuana in an outside pocket.[433] The school principal and aides removed Jones from his classroom, escorted him to his locker, and removed the coat.[434] Jones grabbed the coat and attempted to run away.[435] The principal chased, captured and held Jones until police arrived and retrieved the bag of marijuana from the coat.[436] In his subsequent criminal prosecution, the district court suppressed the evidence as the fruit of an unreasonable search.[437]

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[426] 508 U.S. 366, 378 (1993) (quoting State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992)).

[427] *See, e.g.*, MINN. STAT. ANN. § 121A.72 subdiv. 1 (West 2008) ("The personal possessions of students within a school locker may be searched only when school authorities have a *reasonable suspicion* that the search will uncover evidence of a violation of law or school rules.") (emphasis added).

[428] *In re* Dumas, 515 A.2d 984, 985 (Pa. 1986).

[429] 666 N.W.2d 142 (Iowa 2003).

[430] *Id.* at 144.

[431] *Id.*

Jones reasoned that he had a legitimate expectation of privacy in the contents in the school locker as T.L.O. did in the contents of her purse.[438] School rules recognized that expectation of privacy because they contemplated either a student's presence at a locker inspection or a waiver of the opportunity.[439] Despite his privacy interests, the court characterized the manipulation and inspection of the jacket in the locker as "not overly intrusive, especially in light of the underlying governmental interest and broader purpose of the search" and concluded that the search was reasonable.[440] However, the court did not explain why the school officials' "plain feel" search of

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[432] *Id.*

[433] *Id.*

[434] *Id.*

[435] *Id.*

[436] *Id.*

[437] *Id.*

[438] *Id.* at 148 ("[A] student's locker presents a similar island of privacy [to T.L.O.'s purse] in an otherwise public school. Numerous permissible items of a private nature are secreted away within a locker on a daily basis with the expectation that those items will remain private." (citation omitted)).

[439] *Id.* (finding "a broad societal recognition of a legitimate expectation of privacy in a school locker"). In support of that conclusion the court noted that:

> [T]he school's rules contemplate the presence of the student or at least a "waiver" of the student's opportunity to be present and supervising the search. Moreover, the school rules and state law related to search and seizure in schools are premised on a presumption of privacy; such legislation would likely be unnecessary if no expectation of privacy existed in the first place.

Id.

[440] *Id.* at 149-50 (balancing private and governmental interests and concluding that "while students maintain a legitimate expectation of privacy in the contents of their school locker, that privacy may be impinged upon for reasonable activities by the school in furtherance of its duty to maintain a proper educational environment").

Jones' jacket was any more reasonable than the police officer's manipulation of the contents of Dickerson's pocket. If school officials are state actors under *T.L.O.* and police cannot conduct "plain feel" searches without probable cause, then why can they search a student's private jacket without any justification?

Courts encounter even greater difficulty when school officials search students' luggage prior to or during a school field trip. In *Kuehn v. Renton School District 403*, decided several days prior to *T.L.O.*, school officials searched students' luggage before embarking on a band trip.[441] Although school officials announced prior to the trip that they would inspect luggage for alcohol and insisted that the trip was voluntary, the court found the search invalid.[442] By contrast, the court in *Desilets v. Clearview Regional Board of Education* upheld a similar search because of "the unique burdens placed on school personnel in the field trip context" and the limited search of hand luggage only.[443]

B. Searches of Students' Parked Cars

T.L.O. did not address the search standard for students' cars parked in the school parking lot. Although the Court regularly describes cars as possessing a reduced expectation of privacy, it still requires probable cause before police may seize or search a car.[444] If students are in class and school rules restrict access to their cars during the school day, then is the car's relationship to the school similar to that of a vehicle parked in any public lot?[445] If school officials search a students' parked car, does the traditional automobile search probable standard or *T.L.O.*'s lower reasonable suspicion standard govern their actions?

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[441] 694 P.2d 1078, 1079 (Wash. 1985).

[442] *Id.* at 1079, 1083.

[443] 627 A2d. 667, 673 (N.J. Super. Ct. App. Div. 1993).

[444] *See* United States v. Ross, 456 U.S. 798, 825 (1982) (authorizing search of car and containers if probable cause exists to believe the vehicle contains contraband or evidence); Chambers v. Maroney, 399 U.S. 42 (1970) (approving warrantless search of vehicle at police station even after impounded and immobilized); Carroll v. United States, 267 U.S. 132, 155-56 (1925) (recognizing "automobile exception" to warrant requirement because of "exigent circumstances").

[445] ROSSOW & SEFKOVICH, *supra* note 269, at 31. Rossow and Stefkovich contend that whether or not students have access to their cars during the school day bears on the reasonableness of a search.

Although *T.L.O.* balanced a school's need to preserve order and maintain a learning environment, searches of student's cars may require a different balance.[446] If schools prohibit students' access to their cars, then any threat to the learning environment of contraband stored in their cars is limited. Moreover, an automobile search rests on the likelihood of contraband in the car and not in the student's possession. A vehicle search for weapons or contraband is more likely to produce evidence to be used in a delinquency prosecution, and a probable cause standard should govern admissibility.[447]

Courts confronted with motions to suppress evidence seized from students' cars uniformly adopt *T.L.O.*'s reasonableness balancing approach rather than the traditional Fourth Amendment standard of probable cause.[448] Most courts just

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> If students do not have access to their cars, the extent to which the cars become part of the routine in the school environment is minimal to nonexistent. In that case the expectation for privacy in the car is treated more like that of the home than that of the locker. If the school searches a car in what essentially is a closed campus, the school's interest will be minimal and therefore individual reasonable suspicion should be present. If the students have access to cars throughout the day or even just during the lunch break, the car becomes part of the area of activity for the students. In this case the vehicles become more like their lockers than their homes.

Id. Berman, *supra* note 92, at 1107.

[446] Berman, *supra* note 92, at 1109.

[447] *Id.* at 1111.

[448] Courts have opted for *T.L.O.*'s reasonable suspicion standard to search students' vehicle on school grounds and rejected the probable cause standard for automobile searches. *See* Butler v. Rio Rancho Pub. Sch. Bd. of Educ., 245 F. Supp. 2d 1188, 1200 (D.N.M. 2002), *rev'd and remanded on other grounds*, 341 F.3d 1197 (10th Cir. 2003); Anders v. Fort Wayne Cmty. Schs., 124 F. Supp. 2d 618, 622-23 (N.D. Ind. 2000); Shamberg v. State, 762 P.2d 488, 492 (Alaska Ct. App. 1988); *In re* P.E.A., 754 P.2d 382, 389 (Colo. 1988) (finding reasonable suspicion based on tip and "[c]onsidering the limited ways the students could have transported the marijuana to school and concealed it on school grounds and the magnitude of the threat to having the marijuana sold and distributed at the school"); People v. Williams, 791 N.E.2d 608, 611-12 (Ill. App. Ct. 2003); Myers v. State, 839 N.E.2d 1154, 1159-60 (Ind. 2005), *cert. denied*, 547 U.S. 1148 (2006); Covington Cnty. v. G.W., 767 So. 2d 187, 193 (Miss. 2000) (rejecting probable cause standard and observing that "we can hardly say such a higher expectation of privacy should be had in a car on school property as opposed to a school locker");

assumed that *T.L.O.*'s reasonableness standard governed vehicle searches.[449] In *State v. Best*, assistant principal Brandt received a tip from a student suspected of being under the influence of drugs who informed him that he had ingested a green pill given to him by Best.[450] Brandt located Best in class, escorted him to the office, and confronted him with the allegations.[451] After Best denied any wrongdoing, Brandt searched him and found three white capsules in his pants pocket but no green pills.[452] Brandt searched Best's locker but did not find any pills.[453] Brandt previously had given Best permission to drive his car to school to be serviced in the school's auto shop.[454] Brandt searched the passenger compartment of Best's car and seized drugs and paraphernalia.[455] The trial court and court of appeals found Brandt's search was reasonable and denied

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In re Michael R., 662 N.W.2d 632, 637 (Neb. Ct. App. 2003); F.S.E. v. State, 993 P.2d 771, 772 (Okla. Crim. App. 1999); Coronado v. State, 835 S.W.2d 636, 641 (Tex. Crim. App. 1992); State v. Slattery, 787 P.2d 932, 933-35 (Wash. Ct. App. 1990) ("To limit the school search exception to a search of a student's body or his locker would be anomalous in light of the rationales of *T.L.O.*"); *see, e.g.*, Patrick K. Perrin, *Fourth Amendment Protection in the School Environment: The Colorado Supreme Court's Application of the Reasonable Suspicion Standard in* State v. P.E.A., 61 U. COLO. L. REV. 153, 174 (1990) (analyzing the Colorado Supreme Court's application of *T.L.O.*'s reasonable suspicion standard to searches of students' cars).

Courts apply the probable cause standard when police officers search students' cars on school grounds or when school officials act in concert with police. *See* Marner v. Eufaula City Sch. Bd., 204 F. Supp. 2d 1318, 1325 (M.D. Ala. 2002); James v. Unified Sch. Dist. No. 512, 959 F. Supp. 1407, 1413-14 (D. Kan. 1997); State v. Barrett, 683 So. 2d 331, 339-40 (La. Ct. App. 1996); *In re* Dengg, 724 N.E.2d 1255, 1257-59 (Ohio Ct. App. 1999).

[449] *See* Shamberg v. State, 762 P.2d 488 (Alaska Ct. App. 1988); *In re* P.E.A., 754 P.2d 382 (Colo. 1988); State v. Slattery, 787 P.2d 932 (Wash. Ct. App. 1990); Berman, *supra* note 92, at 1104-11 (analyzing post-*T.L.O.* car search cases).

[450] 987 A.2d 605, 607 (N.J. 2010).

[451] *Id.*

[452] *Id.*

[453] *Id.*

[454] *Id.* School policy required students to obtain approval to drive to school. If permission was granted, the student received a limited-duration parking permit. *Id.* at 608. Students permitted to drive to school for auto shop service had to surrender their car keys to the auto shop teacher. *Id.* If school officials suspected a student had weapons, drugs, or items that pose a threat to other students, they would search the student, the student's locker, and any student's car parked on school property. *Id.*

[455] *Id.* at 607-08. Brandt contacted the school liaison officer who took custody of the drugs and arrested and interrogated Best, who admitted the drugs were his. *Id.* at 608.

Best's motion to suppress the evidence.[456] The New Jersey Supreme Court held that "a school administrator need only satisfy the lesser reasonable grounds standard rather than the probable cause standard to search a student's vehicle parked on school property."[457] The court emphasized school officials' responsibility to protect the safety of students, which drugs and other illegal activities clearly hamper, whether inside the school or in the school parking lot.[458]

> It is the school environment and the need for safety, order, and discipline that is the underpinning for the school official—who has reasonable grounds to believe that a student possesses contraband—to conduct a reasonable search for such evidence. To be sure, a student may hide contraband in his or her clothing, purse, book bag, locker, or automobile. Consequently, we conclude that the reasonableness standard, and not the traditional warrant and probable cause requirements, applies to the school authorities' search of a student's automobile on school property.[459]

Best reasoned that a student could only transport to school and conceal contraband from school officials in a few places—on his person; in a locker, backpack, or purse; or in a car.[460] It concluded that Brandt's search was reasonable because the student informant identified a green pill, Brandt's search of Best produced white pills, and a search of his locker revealed no additional drugs. According to the court, Brandt's process of elimination justified extending the search to Best's vehicle as reasonably related in scope to the initial reason to search.[461]

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[456] *Id.* at 608 (noting that the trial court found Brandt's search of Best's car reasonably related in scope to his reasonable suspicion that he had additional drugs that posed a danger to other students).

[457] *Id.* at 607.

[458] *Id.* at 613. "[T]he need for school officials to maintain safety, order, and discipline is necessary whether school officials are addressing concerns inside the school building or outside on the school parking lot." *Id.* (citing Joye v. Hunterdon Cent. Reg'l Sch. Bd. of Educ., 826 A.2d 624 (N.J. 2003) ("[S]tudents wishing to park on school grounds ask school officials to extend their supervisory authority beyond the classroom.")).

[459] *Id.*

[460] *Id.*; *see, e.g.*, *In re* P.E.A., 754 P.2d 382, 389 (Colo. 1988).

C. Strip Searches

Between *T.L.O.* and *Redding*, school officials regularly conducted strip searches of students.[462] Following *T.L.O.*, courts upheld strip searches of students based on "reasonable suspicion" that the student possessed drugs.[463] Courts are less sympathetic when school staff strip search students to find stolen money or missing property but still grant offending officials qualified immunity.[464] In none of the cases did school officials conduct strip searches to find weapons hidden in students' underwear that might pose an imminent safety threat.[465] Justice Stevens' separate opinion in *T.L.O.* asserted that "the governmental interest which allegedly justifie[d] official intrusion" should bear heavily on the reasonableness of the search.[466] Although drugs and money are items most readily hidden in private areas, courts should not treat suspicion of theft and drug offenses as equally "compelling" governmental interests such as safety and security.

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[461] *Best*, 987 A.2d at 614 ("[T]he vice principal's search of defendant's car was reasonably related in scope to the various locations on school property that defendant might have placed the contraband—on his person, his locker, and his car.").

[462] *See* David C. Blickenstaff, *Strip Searches of Public School Students: Can* New Jersey v. T.L.O. *Solve the Problem?*, 99 DICK. L. REV. 1 (1994) (arguing that strip searches require justifications of probable cause, seriousness, and "imminent threat to safety or health"); Gartner, *supra* note 66, at 925-31 (summarizing numerous instances of strip searches of students in public schools and criticizing T.L.O. for allowing "school officials to exercise virtually unbridled discretion in the area of student searches . . . [and] effectively giv[ing] to teachers the same rights of search given to prison guards"); Steven F. Shatz, Molly Donovan & Jeanne Hong, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 39 (1991) (noting that strip searches constitute a substantial intrusion and inflict serious psychological harm and arguing that "[s]chool officials should not be permitted to strip search any child without a warrant or consent, except in the case of a genuine emergency"); Spellman, *supra* note 80, at 172-74 (analyzing strip search cases).

[463] *See* Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) (deciding that school officials had strong reason to believe that plaintiff was hiding drugs in the crotch of his pants when they took him to locker room and told him to remove pants but allowed him to put on gym uniform during search); Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) (deciding that school officials had reason to believe female student was using drugs when they took student into private office where, in the presence of a female secretary, she removed her shirt, shoes, and socks and lowered her jeans to her knees); Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992) (school officials detected odor of marijuana, observed student acting in a lethargic manner, and took him into a private office and told him to remove jeans but not undergarments); Spellman, *supra* note 80 (noting that schools conduct strip searches based on concerns about school violence and drug use).

[464] Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997) (holding that teachers who twice conducted strip search of two eight-year-old girls in attempt to locate alleged missing $7 were protected by qualified immunity because they should not have known that search was unreasonable); Oliver v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995) (holding that strip search of seventh grade girls in an effort to recover

The Court in *Redding* stated that school officials must possess individualized suspicion prior to conducting a strip search of a student. By approving strip searches even under limited circumstances, the Court effectively equated the power of school officials over students with that of prison guards over convicted inmates.[467] *Redding* missed an opportunity to clarify the appropriate search standard and to require more than reasonable suspicion—i.e., probable cause—because of the greater intrusiveness of strip searches on students' privacy interests.[468]

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stolen $4.50 was unreasonable under the circumstances); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (holding that strip search of entire fifth-grade class to find missing $3 violated Fourth Amendment); State *ex rel.* Galford v. Mark Anthony B., 433 S.E.2d 41, 48-49 (W.Va. 1993) (deciding that strip search of student to find money missing from teacher's purse was excessively intrusive and unreasonable in scope). In *State ex rel. Galford*, the court reasoned that "[a]t some point, a line must be drawn which imposes limits upon how intrusive a student search can be. We certainly cannot imagine ever condoning a search that is any more physically intrusive than the one now before us." *Id.* at 48; *see* Berry, *supra* note 123 (criticizing grant of qualified immunity to protect teachers who conducted clearly unreasonable strip searches).

[465] Thimmig, *supra* note 123, at 1415 (arguing that school officials should only conduct strip searches "for serious violations, particularly drug or weapons possession," and questioning the likelihood that "a student would hide a gun or knife in his/her undergarments").

[466] New Jersey v. T.L.O., 469 U.S. 325, 376 (Stevens, J., concurring in part and dissenting in part) (quoting Terry v. Ohio, 392 U.S. 1, 20-21 (1969)).

[467] *See* Bell v. Wolfish, 441 U.S. 520 (1979) (holding that prison guards' practice of conducting strip and body-cavity searches of inmates after contact visits does not violate Fourth Amendment); Gartner, *supra* note 66, at 931 ("By permitting school officials to exercise virtually unbridled discretion in the area of student searches, the Court has effectively given to teachers the same rights of search given to prison guards.").

[468] *See, e.g.*, Spellman, *supra* note 80, at 172-73) (arguing that a search of a "school age child or adolescent has a greater impact than would the same search of an adult because the development of a sense of privacy is critical to a child's maturation" and

T.L.O. and *Redding* purported to balance the degree of intrusion on individual privacy against the governmental interests. *Redding* acknowledged that a strip search is humiliating, degrading, and constitutes the maximum intrusion on a person's reasonable expectation of privacy.[469] In any reasonableness balancing scheme, if a strip search is that intrusive, then shouldn't the level of suspicion and the governmental interest be equally weighty? All of the reported school strip search cases involved a quest for drugs or stolen money, neither of which poses as imminent a threat to school safety as weapons. In addition to the psychological trauma, a school official's decision to strip search a student conveys a moral message, teaches negative lessons about rights and responsibilities, and strongly affects the student's future relationship with teachers and staff.[470]

It is instructive to contrast *Redding*'s nominal solicitude for strip-searched students with that of juveniles admitted to a juvenile detention facility for non-criminal misconduct. In *N.G. v. Connecticut*, police took truant and runaway girls into custody for status offenses under a statute authorizing detention of children in "families with service needs."[471] A female staff member at the detention center followed a standard protocol and strip searched them without any individualized suspi-

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contending that court must balance "the danger of the student's alleged conduct *against* the need to protect him or her from the humiliation and other emotional harms such a search produces"). Lower courts previously had held that a strip search requires probable cause. *See also* M.M. v. Anker, 477 F. Supp 837 (E.D.N.Y. 1979).

[469] Safford Unified Sch. Dist #1 v. Redding, 129 S. Ct. 2633, 2643 (2009) ("The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.").

[470] Spellman, *supra* note 80, at 173 ("Students learn best about these rights and responsibilities through their observance by knowledgeable teachers and school officials.").

[471] 382 F.3d 225, 226-27 (2d Cir. 2004); *see* CONN. GEN. STAT. ANN. § 46b-120(8) (West 2009) (authorizing secure detention if a judge finds probable cause that a child has run away from home, become beyond the control of parents, engaged in indecent or immoral conduct, been a truant, or engaged in sexual intercourse with another juvenile aged thirteen or older).

cion.[472] Parents of two girls brought suit under § 1983 for damages and injunctive relief against the state and detention facility administrators and claimed that routine, suspicionless strip searches incident to non-criminal misconduct violated the Fourth Amendment.[473] The district court found that the strip searches were reasonable and dismissed the complaint.[474] The Second Circuit Court of Appeals upheld the suspicionless strip searches prior to admission to the detention facility.[475] The *N.G.* majority acknowledged that strip searches of adults arrested for minor offenses were invalid without individualized suspicion to believe they possessed contraband or weapons.[476] However, the court invoked *Earls*' "special needs"[477] and *in loco parentis*[478] rationales to justify suspicionless strip searches. Like *Redding*, the *N.G.* majority recognized that strip searches were humiliating and very intrusive.[479] Even though the girls were not charged with or convicted of any criminal offense, *N.G.* relied on *Earls* to justify the practice.

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[472] *N.G.*, 382 F.3d at 239 (Sotomayor, J., concurring in part and dissenting in part) (describing the strip search protocol followed for all youths admitted to the juvenile detention center).

[473] *Id.* at 229 (majority opinion).

[474] *Id.* at 230.

[475] *Id.* at 237. In *Smook v. Minnehaha County*, police arrested Jodi Smook and her three companions for violating curfew while walking home after her car broke down. 457 F.3d 806, 808 (8th Cir. 2006). The Eighth Circuit Court of Appeals considered the constitutionality of strip searching all juveniles admitted to the juvenile detention center regardless of the seriousness of charged offense or existence of individualized suspicion and upheld the searches based on *N.G. Id.* at 812-14; *see also* Jessica R. Feierman & Riya S. Shah, *Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention*, 60 RUTGERS L. REV. 67 (2007) (criticizing the courts' reasoning in *N.G.* and *Smook* and proposing litigation strategies to challenge suspicionless strip searches of children).

[476] *N.G.*, 382 F.3d at 232 (noting that "strip searches may not be performed upon adults confined after arrest for misdemeanors, in the absence of reasonable suspicion concerning possession of contraband" and observing that all of the circuit courts to rule on the issue have reached that conclusion).

[477] *Id.* at 231 (arguing that *Earls*' "'special needs' test to uphold suspicionless drug testing (urinalysis) of middle and high school students participating in extracurricular activities, and students participating in school athletics" justified extension to strip searches of detention center admitees (citation omitted) (citing Bd. of Educ. v. Earls, 536 U.S. 822, 828-38 (2002))).

[478] *Id.* at 232. Echoing *Acton*'s assertion of "custodial and tutelary" authority, the *N.G.* court asserted that "[w]here the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (*in loco parentis*) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm." *Id.*

> First, although the age of the children renders them especially vulnerable to the distressing effects of a strip search, it also provides the State with an enhanced responsibility to take reasonable action to protect them from hazards resulting from the presence of contraband where the children are confined. The State has temporarily become the *de facto* guardian of children lawfully removed from their home, and "when the government acts as guardian . . . the relevant question is whether the search is one that a reasonable guardian . . . might undertake." The State has a more pervasive responsibility for children in detention centers twenty-four hours a day than for the children in *Vernonia* and *Earls* who were under State authority for the few hours of the school day. Second, a strip search serves the protective function of locating and removing concealed items that could be used for self-mutilation or even suicide.[480]

N.G. concluded that the State's goals to protect children from self-inflicted harm, to protect other inmates, and to maintain institutional safety outweighed the psychological risks of strip searches and the risks to youths' well-being and institutional safety if personnel did not strip search them.

Judge, now United States Supreme Court Justice, Sotomayor dissented from the majority's cavalier treatment of the "severely intrusive nature of strip searches . . . of emotionally troubled children."[481] Although she accepted a reasonableness balancing test, she objected that "the government has failed to demonstrate that its special needs should overcome these concerns and allow for strip searches, in the absence of individualized suspicion, of adolescents who have never been charged with a crime."[482] While the Fourth Amendment does not require officials to use the "least intrusive means" to secure the government's interests, it must demonstrate a "close and substantial relationship" between the asserted need and a substantial intrusion.[483] Judge Sotomayor observed that nearly all the contraband discovered through strip searches could have been found through less intrusive searches or through a policy only to strip search in cases of individualized suspicion.[484] She dismissed the government's claims that the prospect of a strip search prior to admission to detention would deter youths from carrying contraband.[485] She concluded that it was unreasonable to conduct highly degrading, intrusive strip searches of vulnerable young adolescents without any individualized suspicion that they possessed contraband or weighty governmental justification.[486]

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[479] *Id.* at 233 ("The Seventh Circuit has described strip searches as 'demeaning,' 'dehumanizing,' and 'terrifying.' The Tenth Circuit has called them 'terrifying.' The Eighth Circuit has called them 'humiliating.' And since 'youth . . . is a . . . condition of life when a person may be most susceptible . . . to psychological damage,' '[c]hildren are especially susceptible to possible traumas from strip searches.'" (quoting Mary Beth G. v. Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983); Chapman v. Nichols, 989 F.2d 393, 396 (10th Cir. 1993); Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988)).

[480] *Id.* at 236 (citation omitted) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995)). As an additional justification for strip searches, the court stated that "a strip search will often disclose evidence of abuse that occurred in the home," and assist juvenile courts to develop an appropriate treatment plan. *Id.*

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[481] *Id.* at 238 (Sotomayor, J., dissenting). While the majority dryly recited the detention center's written policy, *id.* at 228 n.4, Judge Sotomayor described what they meant in practice.

> The detention facility officers on numerous occasions ordered appellants—troubled adolescent girls facing no criminal charges—to remove all of their clothes and underwear. The officials inspected the girls' naked bodies front and back, and had them lift their breasts and spread out folds of fat. . . . The juvenile detention facilities perform similar searches on every girl who enters, notwithstanding the fact that many of them—indeed, most of them—have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other youths their age.

Id. at 239 (footnote omitted).

[482] *Id.* at 238.

[483] *Id.* at 238, 242 (objecting that "the government has not demonstrated adequately that the highly invasive suspicionless strip searches bore a 'close and substantial relationship to the government's special needs'" (quoting United States v. Lifshitz, 369 F.3d 173, 186 (2d Cir. 2004))).

[484] *Id.* at 242.

[485] *Id.* at 243 (noting that youth are less likely to make that calculus because "it is common for children to be arrested unexpectedly and confined immediately").

[486] *Id.* at 241, 244. Judge Sotomayor criticized the majority's decision:

V. REMEDIES FROM CONSTITUTIONAL VIOLATORS WHO HOLD STUDENTS HOSTAGE

A. § 1983 and School Officials' Qualified Immunity

In most of the cases discussed, plaintiff-students and their parents brought a § 1983 action against school officials for violating their Fourth Amendment rights.[487] Government officials may defend their actions based on a reasonable, good faith belief that their conduct was lawful. The Court, in *Harlow v. Fitzgerald*, clarified the standard courts use to assess the liability of public officials, such as school administrators, alleged to have violated constitutional rights.[488] *Harlow* balanced the need to provide a damages remedy for constitutional violations against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[489] The Court

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> [T]o hold that the strip searches of the two girls . . . were reasonable is equivalent to saying that these girls are entitled to the same level of Fourth Amendment protection as prison inmates held on felony charges, and to decidedly less protection than people crossing the border, jail inmates detained on misdemeanor charges, prison corrections officers, or students in public school.

Id. at 241.

[487] 42 U.S.C. § 1983 (2006) gives citizens a cause of action for damages against public officials who violate their constitutional rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[488] 457 U.S. 800 (1982).

[489] *Id.* at 807 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)). The Court recognized that when public officials violated constitutional rights, an action for damages offered the only realistic remedy and denied absolute immunity. *Id.* at 818-19. On the other hand, the Court stated:

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the

held that public officials enjoyed a qualified, good faith immunity from liability provided "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[490] Although a clearly established constitutional right does not require a direct holding on that issue, it does require that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[491] Moreover, a school district would not be liable for a teacher's constitutional violations based on traditional tort notions of *respondeat superior* unless she acted pursuant to "a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."[492] In short, to extend liability beyond the immediate actors—principal, teachers, or other staff—a student would have to prove that a

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> diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Id. at 814 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[490] *Id.* at 818. The court in *B.C. v. Plumas Unified School District*, 192 F.3d 1260 (9th Cir. 1999), granted school officials qualified immunity for their use of dogs to sniff students in a classroom because their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

> A right is clearly established if the contours of [that] right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. To show that the right in question here was clearly established, [plaintiff] need not establish that [defendants'] behavior had been previously declared unconstitutional, only that the unlawfulness was apparent in light of preexisting law. If the only reasonable conclusion from binding authority [was] that the disputed right existed, even if no case had specifically so declared, [defendants] would be on notice of the right and [they] would not be qualifiedly immune if they acted to offend it.

Id. at 1268 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987); Jensen v. Oxnard, 145 F.3d 1078, 1085 (9th Cir. 1998); Blueford v. Prunty, 108 F.3d 251, 255 (9th Cir. 1997)) (internal quotation marks omitted). The constitutional question whether the use of dogs to sniff students in a school setting constituted a search or violated rights was not clearly established.

[491] *Anderson*, 483 U.S. at 640.

[492] Monell v. N.Y. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

school district adopted a "policy or custom" to violate students' constitutional rights.

In light of the unsettled questions and contradictory answers provided in *T.L.O.*, *Acton*, *Earls*, and *Redding*, would a school principal confronted with a "drug problem"—minor, moderate, severe—who enlisted the assistance of canines to sniff each classroom violate the Fourth Amendment?[493] If the dog alerts to a student, how extensively may authorities search? After *Redding*, would a principal violate a "clearly established constitutional right" if she conducted a strip search based on a tip from another student who reported seeing the student inhale a white powdery substance and who offered it to her? Would a strip search be justified if a teacher stated that the student acted "strangely" on the day of the alleged use? Would it be valid if a typing teacher found a letter at the student's desk that referred to "the rich man's drug" or a father expressed concerns that his daughter might be using drugs?[494] In light of the inherent imprecision of *T.L.O.*'s reasonable suspicion standard, *Redding*'s failure to explain why her strip search was invalid, and the additional latitude provided by a "good faith" and "objective reasonableness" inquiry, how often will a school official who conducts an unreasonable search be found liable for violating students' constitutional rights? After *Redding*, does a student subjected to a strip search based on somewhat different facts have any effective remedy?[495]

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[493] *See, e.g.*, Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980).

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. . . . Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law."

Id. at 92-93 (quoting Wood v. Strickland, 420 U.S. 308, 321 (1975).

[494] *See* Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).

[495] Spellman, *supra* note 80, at 177-78 ("[S]chool teachers and administrators also enjoy a qualified immunity from damages for claims of constitutional violations in actions undertaken in good faith. As a result, because the law on student strip searches is still unsettled, a teacher could successfully defend on the grounds that although the search turned out to be illegal, the teacher acted in good faith at the time.").

B. Impediments to Litigation

The experience after *Wolf v. Colorado* teaches that civil suits are an ineffective way to protect Fourth Amendment privacy rights.[496] In addition to substantial legal impediments to a successful § 1983 action, students and parents confront additional disincentives to challenge school officials' violations of constitutional rights. To bring any tort suit, plaintiffs must go through a process of naming, blaming, and claiming.[497] In some instances, parents may not realize officials have violated their children's constitutional rights.[498] Power differentials between parents and public officials and the opportunity-costs associated with litigation further deter parents from vindicating their children's rights. Parents require tremendous courage, substantial discretionary income for attorneys' fees, and a strong sense of outrage to sue school officials when doing so is such an exercise in futility. If a student remains in the school, then officials effectively hold her hostage and can retaliate directly and indirectly—finding other violations, writing negative evaluations and letters of recommendations, and taking other forms of retaliation. "Parents may be hesitant to file suit while their children are still students under the control of the offending school personnel. In fact, the fear of intimidation and reprisal would seem even greater in the school context due to the continuing interaction between teacher and student."[499] If parents decide to wait until their child graduates, then the statute of limitations may preclude filing suit.

If parents decide to sue and cannot afford a lawyer's hourly rate, then how many attorneys would agree to represent them on a contingent fee basis?[500] Constitutional tort actions are notoriously unsuccessful because of qualified immunity, jury hostility toward litigants, and limited liability by municipalities and school districts.[501] How much is a "priceless liberty" worth? For innocent students, what are the actual damages caused by an unfounded locker search or even a strip search that produces no suppressible evidence?[502] The payout for successfully litigated § 1983 cases are lower than in comparable tort actions.[503]

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[496] 338 U.S. 25, 42-43 (1949) (Murphy, J., dissenting) (describing inadequacy of traditional tort remedies to vindicate privacy rights).

[497] *See, e.g.*, Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV 1147 (1992).

[498] *See, e.g.*, Spellman, *supra* note 80, at 177 ("[P]arents may not realize that their child's constitutional rights have been violated and that they have any legal recourse, particularly if the child never communicates the incident to the parents.").

[499] Spellman, *supra* note 80, at 177.

Finally, it is instructive to review the outcomes in which the Supreme Court reviewed students' Fourth Amendment claims. Whether a student presented the constitutional issue via a motion to suppress evidence—e.g., *T.L.O.* or in a § 1983 civil right action—e.g., *Acton*, *Earls*, and *Redding*—the Court consistently snatched defeat from the jaws of victory. T.L.O. prevailed on her motion to suppress before the New Jersey Supreme Court, but the United States Supreme Court found the search reasonable and upheld her conviction. The Ninth Circuit found the Vernonia School District policy violated James Acton's Fourth Amendment rights,[504] but the Supreme Court reversed and upheld suspicionless random drug testing. Lindsay Earls appealed from an adverse lower court ruling and the

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[500] *See, e.g.*, Smyth v. Lubbers, 398 F. Supp. 777, 794 (W.D. Mich. 1975) ("Students do not normally have the means to maintain a protracted damage action.").

[501] *See, e.g.*, Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 735 (1988) (attributing lack of success of § 1983 actions against police officers to qualified immunity, jury hostility to claimants and limited municipal liability).

[502] Gartner, *supra* note 66, at 928-31 (describing psychological trauma associated with student strip searches).

[503] Lant B. Davis, John H. Small, & David J. Wohlberg, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 789-90 (1979) (attributing low damage awards for Fourth Amendment violations to the absence of physical harm); Gartner, *supra* note 66, at 926-27 (noting that occasionally students and parents receive substantial damages but concluding that "[m]ore often, however, the parties settle out of court, with settlements ranging anywhere from $3400 to $7500 or more."); Schwab & Eisenberg, *supra* note 501, at 737 (studying the difference in damages received and finding the recovery in constitutional tort cases to be less than half of comparable tort cases).

[504] Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514 (9th Cir. 1994).

Tenth Circuit Court of Appeals reversed,[505] only to be overruled by the Supreme Court. After adverse rulings in the district and Circuit Court, the *en banc* Ninth Circuit held that Savana Redding's strip search violated the constitution. The Supreme Court affirmed that conclusion *and* still denied her any remedy. The clear lesson is that regardless of the merits of a student's claim, if the Supreme Court decides the case, then they will lose.

CONCLUSION

T.L.O. created a school search exception to the Fourth Amendment where none was necessary. *Terry* provides a perfectly adequate response for teachers to conduct less intrusive investigation of students and *Gates*'s probable cause provides a workable standard in every other context in which state agents conduct full-blown searches. *T.L.O.* adopted a reasonableness standard that has no objective meaning and enables school officials to subject students to a regime more suitable to prisons than to educational environments—suspicionless drug testing, video surveillance, canine sniffs, and strip searches.[506] In reviewing *T.L.O.*'s unanswered questions, the Court and lower courts have further minimized students' privacy interests—e.g., *Acton* and *Earls*—and dramatically increased the power of the State. Public and political panics about drugs and violence have encouraged school boards to adopt heavy-handed and counterproductive strategies—to station police in schools, to enlist dogs to sniff for contraband, to adopt zero tolerance policies that produce patently irrational results, and to deny students any expectation of privacy in their desks, lockers, or cars. Minimal legal protection, increased surveillance, heightened police presence, and school officials' repudiation of common sense and judgment have fostered a school-to-prison pipeline that adversely affects all youths, especially students of color.

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[505] *See* Earls v. Bd. of Educ., 115 F. Supp. 2d 1281 (W.D. Okla. 2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001).

[506] Blumenson & Nilsen, *supra* note 193, at 73. The authors conclude that:

> Given the evisceration of any requirement of individualized suspicion and the virtual elimination of any expectation of privacy among public school students, the Court's incantation of Fourth Amendment protections to public schools is more ritual than substance. It is also clear that, whatever minimal doctrinal protections survive, random locker searches, video surveillance, records identifying potential troublemakers, and drug testing are increasingly commonplace in many schools around the country.

Id.; *see also* Beger, *The "Worst of Both Worlds," supra* note 185, at 337 ("By allowing police to search students without probable cause, courts have placed school children into a position that is the 'worst of both worlds,' reducing Fourth Amendment protections in a setting of security and penalties for even minor misconduct.").

The Court defines rights and prescribes remedies.[507] For students, the absence of any effective remedy accompanies the Court's rejection of substantive Fourth Amendment rights. Lower courts routinely grant qualified immunity and summary judgment to offending school personnel who exercise egregious judgment. Only the most determined litigants—James Acton, Lindsay Earls, Savana Redding—obtain any § 1983 relief and then the Supreme Court takes it away. Non-constitutional tort suits provide no practical remedy because of prohibitive costs of litigation and the minimal financial damages associated with typical Fourth Amendment violations. The absence of an exclusionary rule or other systemic remedy enables school officials to remain ignorant of constitutional obligations and to violate students' rights with impunity. In short, students have few rights and even fewer remedies.

Schools are the incubators of future citizens, and school officials convey moral lessons by their actions.[508] Providing young people with real Fourth Amendment protection and meaningful enforcement mechanisms will better socialize them to participate effectively in a democratic society as adults.[509] Although

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[507] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (adopting the exclusionary rule to sanction constitutional violations).

[508] The Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943), emphasized that schools "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

[509] *See, e.g.*, State v. Joseph T., 336 S.E.2d 728, 738-40 (W.Va. 1985) (McGraw, J., dissenting). Justice McGraw dissented from the court's adoption of *T.L.O.*'s reasonable suspicion standard in lieu of probable cause. He concluded that:

> [P]erhaps it is fitting that our children learn at a tender age that the struggle of our ancestors against the arbitrary exercise of the will of the Crown has

the Court insists that "students . . . [do not] shed their constitutional rights . . . at the schoolhouse gate,"[510] a quarter of a century of Fourth Amendment decisions have created "enclaves of totalitarianism."[511] The moral lesson of *T.L.O.* and its progeny is that we inculcate in students the values and virtues of citizenship by denying them fundamental constitutional rights.

> become our struggle against the arbitrary exercise of the will of those who seek to "balance" away as "mere platitudes" the fundamental constitutional rights for which those ancestors fought and died.

Id. at 740; *see also In re* William G., 709 P.2d 1287, 1298 (Cal. 1985) (Bird, C.J., concurring in part and dissenting in part) (advocating probable cause rather than reasonable suspicion school search standard).

[510] Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969) (affirming students' First Amendment rights and invalidating school prohibition of wearing black arm bands to protest war in Vietnam).

[511] *Id.* at 511; *see also Barnette*, 319 U.S. 624.

STRIP SEARCHING STUDENTS: THE SUPREME COURT'S LATEST FAILURE TO ARTICULATE A "SUFFICIENTLY CLEAR" STATEMENT OF FOURTH AMENDMENT LAW†

*Martin R. Gardner**

INTRODUCTION

In its recent *Redding* case, which found unconstitutional a strip search of a middle school student,[1] the Supreme Court admitted that its prior case law had failed to articulate a "sufficiently clear" statement of the Fourth Amendment law governing intrusions by school officials beneath the clothing of students.[2] In an opinion aimed at providing such clarity, Justice

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[1] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2637 (2009). Although the search in *Redding* was deemed unconstitutional, the Court found that the school officials conducting the search enjoyed qualified immunity from liability because "clearly established law [did] not show that the search violated the Fourth Amendment" at the time of the search. *Id.* at 2643 (quoting Pearson v. Callahan, 129 S. Ct. 808, 822 (2009)). *See* Recent Cases: Section 1983—Qualified Immunity—*Ninth Circuit Holds that School's Strip Search of a Student Violated the Fourth Amendment Under Clearly Established Law*—Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071 (9th Cir. 2008) (en banc), 122 HARV. L. REV. 811, 811 (2008) (criticizing the Ninth Circuit en banc opinion in the *Redding* case for its denial of qualified immunity on the view that the strip search was unconstitutional under "clearly established" law).

[2] *Redding*, 129 S. Ct. at 2644; *see* Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve*

Souter and seven other members of the *Redding* Court[3] found so-called "strip searches"[4] sui generis and set about to assess the constitutionality of such intrusions. Given the divergent opinions of the lower courts,[5] including those considering the *Redding* case itself,[6] Supreme Court guidance is overdue. School officials have interests in knowing with as much certainty as possible when, in the exercise of their "custodial," "tutelary," and "guardian[ship]" responsibilities towards their students,[7] they can protect educational environments by conducting strip searches without fear of liability. By the same token, students have privacy interests in being protected from intrusive school searches. Unfortunately, however, *Redding* fails to deliver the sufficiently clear guidance promised.

This article assesses *Redding*'s effectiveness as a vehicle for determining the constitutionality of student strip searches, taking into account several troubling questions still unresolved but not raised in that case. The discussion will establish that *Redding* fails to deliver the sufficiently clear guidance promised

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the Problem, 70 S. CAL. L. REV. 921, 956 (1996) ("guidance is not available [under Supreme Court case law] leaving millions of students vulnerable to the continuing threat of strip searches"); Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After* Board of Education v. Earls, 56 S.C. L. REV. 1, 4 (2004) (explaining that Supreme Court case law provides no "unifying clarity" for educators).

[3] Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, Alito, Stevens, and Ginsburg joined in the parts of the Souter opinion finding the search of the student unconstitutional. 129 S. Ct. at 2637.

[4] The Court characterized the situation in *Redding* as a "strip search" wherein a student was ordered by female school officials to remove her outer clothing, pull her bra out and shake it, and to pull out the elastic on her underpants thus exposing her breasts and pelvic area to some degree. *Id.* at 2641.

[5] *Compare e.g.*, Williams v. Ellington, 936 F.2d 881, 882-83, 887 (6th Cir. 1991) (upholding a strip search of a high school student for drugs without any specific suspicion that drugs were hidden next to her body), *with* Phaneuf v. Fraikin, 448 F.3d 591, 596 (2d Cir. 2006) (requiring a higher level of suspicion to justify a strip search than is necessary for less intrusive searches).

[6] Initially, a district court and two-judge majority of a Ninth Circuit panel upheld the search in the *Redding* case, Redding v. Safford Unified Sch. Dist. #1, 504 F.3d 828, 829 (9th Cir. 2007), only to be reversed by the Ninth Circuit en banc, Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071, 1089 (9th Cir. 2008) (en banc).

[7] The Court has so characterized the relationship between educators and their students. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) (upholding drug testing of students as precondition for participating in school athletics).

by the Court. Indeed, the case raises more questions than it answers. While requiring a distinct constitutional analysis for student strip searches, the *Redding* Court propounds two inconsistent versions of tests that unwisely invite judicial excursion into matters of education policy. As a result, *Redding* will only spawn confusion, lower court litigation, and ultimately the necessity for additional Supreme Court clarification.

Section I of this article examines the *Redding* case in depth. Section II offers a critique of *Redding* and notes unresolved issues in need of future attention. Section III tests the analytical utility of *Redding* by rethinking three representative lower court strip search cases in its light, concluding that *Redding* is of little use in advancing analysis. Section IV assesses *Redding*'s future and argues for a simplified *Redding* standard that finds strip searches constitutional if those conducting the search are motivated by legitimate educational concerns. The Article concludes by urging educational policymakers to adopt provisions that narrowly regulate, if not eliminate altogether, strip searches in the schools.

I. THE *REDDING* CASE

A. The T.L.O. *Framework*

Redding is the Supreme Court's first consideration of a school strip search, but constitutes its second attempt at framing a Fourth Amendment standard for cases where school officials search students with suspicion that a particular student is offending a school rule.[8] In *New Jersey v. T.L.O.*,[9] the Court attempted to accommodate the interests of school officials in maintaining a sound educational environment and the privacy interests of students. The Court rejected the traditional probable cause standard as the threshold requirement for permissible searches and seizures in favor of a more flexible "reasonable suspicion" test.[10] The *T.L.O.* Court explained that "reasonableness" is dependent on the context in which a search takes place and requires "balancing the need to search against the invasion which the search entails."[11] On one side of the balance are the student's legitimate expectations of privacy and personal security; on the other, the school's need for effective methods to assure student safety and discipline within the school. The *T.L.O.* Court specified that determining the reasonableness of any school search involves a two-pronged inquiry: "whether the . . . action was justified at its inception" and "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[12] Searches of students will generally be "justified at their inception" so long as there are reasonable grounds to suspect that the search will turn up evidence indicating that the student has violated either the law or a school rule.[13] As to the second prong, the Court explained that searches "will be permissible in their scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[14] Surprisingly, the Court neither explained the relevance of the age, sex, and nature of infraction factors, nor applied them to the *T.L.O.* facts.[15]

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[8] The Court has decided two other school search cases, both involving situations where school officials conducted searches lacking individualized suspicion. *See Acton*, 515 U.S. 646; Bd. of Educ. v. Earls, 536 U.S. 822, 825 (2002) (upholding drug testing of all students wishing to participate in school extracurricular activities).

[9] New Jersey v. T.L.O., 469 U.S. 325, 328, 343 (1985) (upholding search by a male school official of a fourteen-year-old student's purse after she was observed smoking in the restroom in violation of a school rule).

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[10] *Id.* at 340-41. The *Redding* Court explained the difference in the two tests as follows: probable cause requires a "substantial chance" of discovering incriminating evidence while reasonable suspicion requires only a "moderate chance" of finding evidence of wrongdoing. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2639 (2009).

[11] 469 U.S. at 337 (quoting Camara v. Mun. Court, 387 U.S. 523, 536-37 (1967)).

[12] *Id.* at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[13] *Id.* at 341-42.

[14] *Id.* at 342.

[15] I have commented on this aspect of *T.L.O.* elsewhere, addressing the factors in reverse order.

> The nature of the infraction consideration . . . seemingly speaks to the necessity of searching based on considerations of educational policy. If drug abuse and violent crime are . . . the "major" problems in the schools, school authorities would seemingly possess broader authority to search students

B. The Redding *Decision*

With the *T.L.O.* Standard in hand, the *Redding* Court addressed the constitutionality of a search of a 13-year-old student, Savana Redding, by school officials who suspected that

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suspected of offenses manifesting those evils than when investigating other kinds of offenses. . . . Yet, in its only discussion of the "nature of the infraction" consideration, the *T.L.O.* majority denied that it had anything of that sort in mind:

> The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

It is thus anybody's guess what the Court had in mind when it included "nature of the infraction" in its list of relevant considerations to be taken into account in the balancing analysis.

Similarly, the Court never explained the relevance of the sex of the student consideration. At least two possible explanations seem plausible. Perhaps the Court is suggesting that some intrusions characteristically affect members of one sex differently from those of the other. If this is the Court's view, the search of a female student's purse seems especially intrusive given that purses typically contain items of a highly personal nature such as "notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene." On the other hand, the Court may have focused on the sex of the student as relevant when the search is conducted by a school official of the opposite sex. Such searches are presumably more intrusive than those conducted by a member of the student's sex. If this is the point, the search of *T.L.O.*'s purse . . . by a male principal in a private office again appears highly intrusive.

Finally, the Court informs us that the "age of the student" is also relevant in weighing the interests involved in school searches. Perhaps the Court is suggesting that privacy interests increase with age. . . . If so, assuming her general competency, as a fourteen-year-old adolescent *T.L.O.* would appear a fit candidate for treatment . . . to full-fledged privacy protection. On the other hand . . . the Court may be suggesting the opposite, that younger children, due to their unique impressionability, are to be afforded greater privacy protection than older ones. Again, because the Court neither applied the age consideration to the *T.L.O.* facts nor explained its relevance, the age factor's relevance and utility as an analytical tool are unclear.

Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 922-23 (1987) (citations omitted). *See infra* note 49 and accompanying text.

she was concealing contraband prescription and over-the-counter drugs[16] under her clothing while at school. The suspicion was based on an accusation conveyed to an assistant principle by a student, Marissa, who was found in possession of several pills contrary to school rule[17] which she claimed to have received from Redding.[18] Marissa was also found in possession of Redding's day planner which contained non-drug contraband.[19] Earlier that day, the assistant principal had received a visit from another student, Jordan, who surrendered a pill, stating that he had received it from Marissa. The assistant principle was aware that a week earlier Jordan had claimed to have become ill from a pill given to him by a classmate and that some students were bringing drugs and weapons to school. Furthermore, upon presenting the pill to the assistant principal, Jordan informed him that some students were planning to take pills at lunch that day.

Acting on this information, the assistant principal called Redding into his office at which time she admitted being friends with Marissa and owning the day planner, but denied knowledge of the contraband found therein. The assistant principal then showed Redding the pills he had received from Jordan and Marissa but she denied distributing or knowing anything about them. After being informed of the reports implicating her in distributing the pills, Redding consented to a search of her backpack and outer clothing which revealed nothing wrongful. The assistant principal then directed the school nurse and another female administrative assistant to take Redding to the nurse's office to search beneath her clothing for pills. The two school officials then directed Redding to remove all her clothing except her bra and underwear. After finding no contraband in her clothing, the officials directed Redding to pull her bra out to the side and shake it, and to pull out the elastic on her underpants. The search thus exposed her breast and pelvic area to some degree but turned up no pills or other evidence.

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[16] The school rule at issue proscribed "the nonmedical use, possession, or sale of any drug on school grounds including 'any prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.'" Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2639-40 (2009) (citation omitted).

[17] *See supra* note 16.

[18] The pills were discovered when school officials "requested Marissa to turn out her pockets and open her wallet." *Redding*, 129 S. Ct. at 2640. A subsequent search of her bra and underwear by the female school nurse and a female administrative assistant turned up no further evidence. *Id.*

[19] The planner contained several "knives, lights, . . . and a cigarette. *Id.* at 2638.

The Court concluded that the school officials had reasonable suspicion that Redding was distributing pills and hence that she may be carrying them on her person or in her backpack, "the carryall that has become an item of student uniform in most places today."[20] Therefore, the search of Redding's backpack and outer clothing was permissible and not excessively intrusive[21] because if "reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack[s], it would not justify any search worth making."[22]

As to whether the search was "worth making," the Court observed that the legitimacy of the school ban on drugs "goes without saying."[23] Moreover, school officials must be free to determine school standards of conduct without being "second-guess[ed] by courts lacking the experience to appreciate what may be needed."[24]

In upholding the constitutionality of the searches of Redding's outer clothing and her backpack, the Court simply deemed the searches reasonable with no direct application of the *T.L.O.* criteria, nor any analysis. The Court offered no assessment of the balance between the interests of the assistant principal in searching, and Redding's interest in maintaining her privacy. Again, as in *T.L.O.*, the *Redding* Court made no attempt to relate the "age, sex, and nature of the infraction" factors[25] to its assessment of the reasonableness of the clothing and backpack searches. Instead the Court simply concluded that they were "not excessively intrusive."[26]

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[20] *Id.* at 2641. While Redding may have consented to the searches of her backpack and outer clothing, the Court analyzed the situation as a non-consensual search finding that the assistant principal had "reasonable suspicion" to conduct those searches without Redding's consent. *Id.*

[21] The Court noted that the search of the Redding's backpack occurred in her presence and in the "relative privacy" of the assistant principal's office. *Id.*

[22] *Id.*

[23] *Id.* at 2640 n.1. The Court observed that except in cases of "patently arbitrary instances," Fourth Amendment analysis takes the rule as "a given." *Id.* Thus in the context of the rule applicable in *Redding*, "[t]here is no need here either to explain the imperative of keeping drugs out of schools, or to explain the reasons for the school's rule banning all drugs, no matter how benign, without advance permission." *Id.*

[24] The Court explained that "[t]eachers are not pharmacologists trained to identify pills and powders, and an effective drug ban has to be enforceable fast." *Id.*

The Court took a different view regarding the constitutionality of the strip search, finding it a "categorically distinct" search "requiring distinct elements of justification"[27] which were not satisfied in *Redding*. The exposure of Redding's breasts and pelvic area constituted a sui generis Fourth Amendment intrusion involving heightened "subjective and reasonable societal expectations of personal privacy."[28] Redding experienced embarrassment, fear, and humiliation pursuant to the intrusion, "reasonable" feelings in the eyes of the Court given the "consistent experiences of other young people similarly searched."[29] Based on the fact that some jurisdictions have forbidden strip searches altogether, the Court concluded that the accusation of wrongdoing inherent in searches exposing the body conveys a different and more degrading meaning to young people than do other, more ordinary, experiences of nakedness at school such as changing into gym clothes and showering after class.

With these considerations in mind, the Court found that the degree of suspicion failed to match the extent of the intrusion entailed in the strip search of Redding, thus rendering the search violative of the Fourth Amendment. The Court minimized the educational interest in conducting the search in light of the fact that the assistant principal was looking for drugs posing a "limited threat" to the educational environment, with no reason to suspect that large amounts of drugs were involved or that individual students were receiving great numbers of pills.[30] While such assessments may appear to constitute employment of the "nature of the infraction" factor of the *T.L.O.* test,[31] the Court did not clearly say so nor did it mention *T.L.O.*'s "age and sex of the student" factors.[32]

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[25] *See supra* note 14 and accompanying text.

[26] 129 S. Ct. at 2641.

[27] *Id.*

[28] *Id.*

[29] *Id.* The Court based this conclusion on two sources: Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondent, at 6-14, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479); Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998).

As a further indication of the unreasonableness of the strip search, the Court found that the assistant principal could not have suspected that Redding was hiding contraband in her underwear. While granting that school students have been known to hide forbidden items beneath their clothing, the Court found that the assistant principal had no information that Redding was doing so nor that any other student at his school had ever done so. The Court concluded that a "reasonable search" as extensive as that of Redding "calls for suspicion that it will pay off."[33]

In articulating the test for assessing future strip searches, the court said the following:

> [W]hat was missing from the suspected facts that pointed to [Redding] was any indication of danger to the students [hereinafter "the danger factor"] from the power of the drugs or their quantity, and any reason to suppose that [Redding] was carrying pills in her underwear [hereinafter "the in the underwear factor"]."[34]

The Court subsequently added the following:

> We [intend] to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably

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[30] 129 S. Ct. at 2642.

[31] *See supra* notes 14-15 and *infra* notes 44-48 and accompanying text.

[32] *See supra* notes 14-15 and *infra* notes 44-48 and accompanying text.

[33] 129 S. Ct. at 2642.

[34] *Id.* at 2642-43 (emphasis added).

> make the quantum leap from outer clothes . . . to exposure of intimate parts.[35]

II. CRITIQUE

A. Redding *and* T.L.O.

The *Redding* case presented the Supreme Court with the opportunity to clarify the circumstances, if any, under which strip searches of school students are constitutionally permissible. With *T.L.O.* as the sole standard, the lower courts have struggled in relating its two-prong approach to the strip search context.[36]

Analytical uncertainty has centered on the question of whether searches like those in *Redding* constitute two distinct searches, the first comprising intrusions preceding the strip search with the strip search being a second separate search, or whether only a single progressively more intrusive search is involved.[37] The question is significant for, among other things, under *T.L.O.* each "search" must be subjected to the two-prong analysis.[38] Each must be justified at its inception and reasonable in its scope. If the search in *Redding* constituted a single search, the issue would be whether the initial search of the clothing and backpack was justified at the inception of the assistant principal's initial encounter with Redding and if so then whether the strip search was permissible under the reasonable-in-scope prong. On the other hand, if multiple searches were involved, the clothing/backpack and the strip search must each satisfy both the justified at its inception and the reasonable-in-scope prong.[39]

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[35] *Id.* at 2643 (emphasis added).

[36] *See, e.g.*, Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 827-28 (11th Cir. 1997) (characterizing *T.L.O.* as "lack[ing] specificity," failing to "establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.*," and articulating a "series of [unhelpful] abstractions").

[37] *See* Brief for National School Boards Association and American Association of School Administrator as Amici Curiae Supporting Petitioner, at 8-9, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479). For examples of the two search view, see the discussion of the *Galford* case, *infra* notes 165-92 and accompanying text and *Thomas v. Roberts*, 261 F.3d 1160, 1169 (11th Cir. 2001) which found strip searches of students "not justified at their inception" while searches of clothing preceding the strip searches as reasonable and "justified at their inception." For examples of the single search view, see *infra* notes 193-226 and accompanying text (discussing the *Fewless* case) and *H.Y. v. Russell County Board of Education*, 490 F. Supp. 2d 1174, 1187 (M.D. Ala. 2007) (seeing *Redding*-type intrusions as a single search with searches of clothing justified at their inception but becoming excessive in their scope when they progress to strip searches).

[38] *See supra* notes 10-12 and accompanying text.

1. *Redding* as One Search

The *Redding* opinion is not clear as to whether it recognizes a single series of intrusions culminating in the strip search or whether the case involves two distinct searches. The case can be read to reflect the one-search view.[40] In its only application of *T.L.O.*, the *Redding* Court suggested that both its danger and in the underwear factors speak to *T.L.O.*'s concern to limit student searches to a "reasonable scope,"[41] the second prong of the *T.L.O.* standard.[42] The Court made no mention of the first *T.L.O.* prong, presumably because the search of Redding was "justified at its inception" by the evidence providing reasonable suspicion to search her outer clothing and backpack. On this view, there was one search, justified at its inception, which became unconstitutional as its increasing intrusiveness exceeded reasonable scope.

2. *Redding* as Two Searches

On the other hand, viewing *Redding* as a one search situation is difficult to reconcile with the Court's finding that the strip search constituted a "categorically distinct" search "requiring distinct elements of justification."[43] Such language clearly suggests that the Court embraced the multiple search view. If so, the searches of Redding's outer clothing/backpack and the strip search would each be required to separately satisfy both prongs of the *T.L.O.* test.

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[39] *See supra* note 37.

[40] Three members of the Court understood *Redding* as involving a single, progressively intrusive, search culminating in the strip search. Justices Stevens and Ginsburg saw *Redding* as "chart[ing] no new constitutional path" but simply applying the *T.L.O.* framework in finding the search of *Redding* justifiable at its inception but becoming excessively intrusive in its scope when the principal conducted the strip search. 129 S. Ct. at 2644-45 (Stevens, J., concurring in part and dissenting in part). Justice Thomas took a similar view, finding the search justifiable at its inception and also reasonable in its scope, including the strip search. *Id.* at 2648-49 (Thomas, J., concurring in part and dissenting in part).

[41] *Id.* at 2642 (majority opinion).

[42] *See supra* notes 10-12 and accompanying text.

a. The Redding *Danger Factor as an Aspect of* T.L.O.*'s "Nature of the Infraction" Consideration*

In analyzing the strip search as a "distinct" search, it could be that *Redding*'s "suspicion of danger factor" is conceptually a function of the "nature of the infraction" consideration under the second prong of the *T.L.O.* standard. If so, the analysis suggests that the more serious the infraction, that is the greater the "danger" it poses to the educational environment, the more latitude school officials will have in conducting intrusive searches, including those beneath student clothing.[44] If this indeed is the *Redding* Court's view, however, it is, as pointed out by Justice Thomas in his lone dissent, at odds with the spirit of the *T.L.O.* Court's instruction that the relative importance of school rules, and presumably school dangers, is a matter for educators to determine and not for courts when conducting nature of the infraction analysis under *T.L.O.*'s scope prong.[45] In minimizing the strength of the educational interest supporting the strip search in *Redding*,[46] the Court did not follow *T.L.O.*'s admonition to defer to educators but instead engaged in an assessment of the relative danger posed to the educational environment by the specific drugs prohibited under the school rule.

With no explanation from the *Redding* Court, the significance of this new approach is not clear. If the danger analysis indeed falls under *T.L.O.*'s nature of the infraction subset of the scope prong, does this constitute a break from the Court's previous deference to educators to assess relative dangers to their schools in making decisions to search students[47] signaling a new era where courts are now to make danger assessments in school search cases across the board?[48] Or, might the Court have carved out an exception permitting judicial assessments of danger, and its relative prevention under school rules, available only when conducting reasonable scope analysis in the unique context of strip searches? Finally, might it be that *Redding*'s danger factor is not a function of the scope of the search inquiry under *T.L.O.* at all, but rather part of a new analysis limited to strip searches distinct and apart from *T.L.O.* altogether?

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[43] *See supra* note 27 and accompanying text.

[44] This is the view taken by Justice Thomas, although in the single search context beginning with Redding's clothing and culminating with the strip search. 129 S. Ct. at 2647-49, 2650-51 (Thomas, J., concurring in part and dissenting in part).

[45] *Id.*; *see supra* note 15 (discussing the *T.L.O.* nature of the infraction consideration).

[46] *See supra* notes 30-32 and accompanying text.

b. "The Danger" and "The In the Underwear Factors" as Justifying Strip Searches at their Inception

Assuming again that *Redding* recognized the clothing/backpack and nude body searches as two separate Fourth Amendment intrusions and that the *T.L.O.* standard continues to speak to both, it is possible to see both the danger and the in the underwear factors as speaking only to the search at its inception inquiry under the first prong of *T.L.O.* On this view, the Court might simply have concluded that the strip search of

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[47] I have earlier shown that in the context of student search and seizure cases prior to *Redding*, the Court had granted virtually unfettered discretion to school officials to assess the need to search students in their charge. Martin R. Gardner, *The Fourth Amendment and the Public Schools: Observations on an Unsettled State of Search and Seizure Law*, 36 CRIM. L. BULL. 373, 379 (2000). I suggested, in fact, that the Court's deference was so substantial that the actions of school officials in searching their students would be upheld so long as the officials acted in good faith. *Id.* at 379-80, 384-85. Although these views did not take into account the Court's opinion in *Board of Education v. Earls*, 536 U.S. 822 (2002) (upholding drug testing of students as a precondition for participating in school extra-curricular activities) which was handed down subsequent to their publication, there is nothing in *Earls* to call the views into question. Indeed, the *Earls* Court noted that in the school setting "[a] student's privacy interest is limited . . . where the State is responsible for maintaining discipline, health, and safety." 536 U.S. at 830.

[48] Justice Thomas expressed such fears in his dissent. 129 S. Ct. at 2651-52 (Thomas, J., dissenting).

Redding was not justified at its inception, thus rendering it unnecessary to move to the reasonable-in-scope prong. Thus in cases of reasonable suspicion of danger to the educational environment and/or of reasonable suspicion that a student has hidden evidence under her clothing, a strip search could still be unconstitutionally intrusive by exceeding the permissible scope of acceptable Fourth Amendment searches.[49]

c. Redding *as Unrelated to* T.L.O.

Thus far, the discussion has assumed that *Redding* constitutes an attempt to expand the *T.L.O.* standard to the context of strip searches. However, given the Court's failure to directly apply the *T.L.O.* standards, it is possible to read *Redding* as replacing altogether the *T.L.O.* rubric with the new two-factor approach fashioned especially for the "categorically distinct" context of strip searches. If so, any search satisfying one or both of the *Redding* factors (depending on whether the Court intends the factors to be in the disjunctive or the conjunctive) could be constitutional without being required to satisfy *T.L.O.*'s requirement that the scope of the search take into account the student's age and sex and the type of the infraction.

d. Summary

Given the uncertainties about whether the Court sees *Redding* as a single or multiple search situation and questions about the extent to which *T.L.O.* governs the strip search context, a single, coherent, analytical framework is not apparent from the *Redding* case and cannot be discerned until the Court answers the following questions: Is *Redding* a single search situation? If so, does satisfaction of the Redding factors necessarily satisfy the scope prong of *T.L.O.*? If not, how do *T.L.O.*'s concerns for the "age and sex of the student and the nature of the infraction" factor into the analysis?[50] On the other hand, if *Redding* constitutes separate clothing/backpack and strip searches, what is the relationship of *T.L.O.* to the strip search? If *T.L.O.* applies, what is the relationship of the two *Redding* factors—reasonable suspicion of danger and/or reasonable suspicion of evidence of wrongdoing hidden on the body—to the two-prong *T.L.O.* test? Do either of the *Redding* factors suffice to justify a strip search at its inception? Are both necessary? If strip searches are governed solely by the *Redding* factors with *T.L.O.* inapplicable, are searches meeting either or both of the *Redding* factors necessarily constitutional?[51]

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[49] For example, a strip search permissible at its inception under one or the other versions of *Redding*'s two-factor standard might nevertheless be unconstitutional in its scope if a male official conducts the strip search of a female student, if the search was conducted in the presence of numerous school officials or other students, or if while looking for a particular item of evidence school officials search parts of the student's body where the item could not reasonably be concealed.

B. Problems with Redding *Itself*

1. A Conjunctive or Disjunctive Standard?

Whatever its relationship to *T.L.O.*, *Redding*'s two-factor approach is itself problematic, constituting in Justice Thomas's words a "vague and amorphous" standard[52] that provides insufficient guidance for school administrators in determining when they can constitutionally conduct strip searches of students.

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[50] As mentioned *supra*, the Court has never explained how the "age, sex, and nature of the infraction" considerations apply in the scope of the search analysis. *See supra* note 15 and accompanying text. An amicus brief in *Redding* urged the Court to clarify the matter. Brief for the National Association of Social Workers, *supra* note 29, at 6, 10, 12. The only member of the *Redding* Court to offer any explanation of any of these considerations was Justice Thomas who offered two viewpoints about what the "nature of the infraction" factor might mean. As discussed above, Thomas accused the majority of interpreting the factor to mean that courts can now take into account the relative danger to the educational environment under a given school rule in deciding whether the "nature of the infraction" justified the intrusiveness of a given search. *See supra* notes 43-47 and accompanying text. Justice Thomas also pointed out that rather than going to the seriousness of the danger posed by violation of the rule, the "nature of the infraction" consideration means instead that searches must be limited to areas where the object of that infraction could be concealed. *Redding*, 129 S. Ct. at 2649 (Thomas, J., concurring in part and dissenting in part). Again, no member of the Court offered any insight into what the "age and sex of the student" factors might mean.

[51] For example, assuming the *Redding* factors are satisfied, would a strip search of a female student by a male school official be permissible? What about a body cavity search if the evidence is not revealed by a mere strip search?

[52] *Redding*, 129 S. Ct. at 2646 (Thomas, J. concurring in part, dissenting in part).

The most obvious confusion, not noticed, incidentally, by any of the Justices, stems from the Court's very articulation of the standard provided to govern strip searches which states the two factors of the standard in obviously inconsistent conjunctive and disjunctive formulations.[53] Does the Court intend that there be both reasonable suspicion of danger and of hiding evidence of wrongdoing beneath student clothing for a strip search to be constitutional or will evidence of either suffice? If the two-factor standard is intended in the conjunctive, is a sliding scale approach also intended so that a deficiency in one factor may be compensated for by a strong showing as to the other?[54] If, on the other hand, a disjunctive standard is intended, does the Court really mean that a strip search would be justified if school officials have strong evidence that a student is hiding a presumably non-dangerous item of contraband, say a single tobacco cigarette, beneath her clothing? Or could they strip search an entire student body if they have reason to believe that some unidentified student possesses explosives which could possibly be hidden beneath their clothing?

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[53] *See supra* notes 34-35 and accompanying text. Interestingly, in criticizing the majority for espousing a "vague and amorphous standard," Justice Thomas refers to both the disjunctive and the conjunctive versions without noting the difference. 129 S. Ct. 2648-49, 2650-51 (Thomas, J., concurring in part and dissenting in part). *See infra* note 55. It could be argued that the conjunctive formulation of the two-factor standard should be read not as a statement of a proposed test itself, but rather, as a mere identification of the two factors that will constitute the elements of the test stated later by the Court in the disjunctive. The author is grateful to Professor Edwin Butterfoss for pointing out this possibility during an oral conversation. However, it appears more reasonable to understand the conjunctive statement as itself a proposed test given the Court's observation immediately following its articulation of the conjunctive language: "We think that the combination of these deficiencies [danger to the student and reason to believe evidence was hidden in the underwear] was fatal to finding the search reasonable." 129 S. Ct. at 2643 (majority opinion) (emphasis added). Furthermore, Justice Thomas clearly reads the conjunctive statement as a proposed test. *See infra* note 55.

[54] For example, suppose the "danger" factor is minimally present by evidence that a student possesses a single marijuana cigarette, *see infra* notes 56-65 and accompanying text, but three eyewitnesses testify that the student is hiding the cigarette in her underwear, thus providing strong evidence of the hidden in the underwear factor. Does the strength of the second factor compensate for the weakness of the first? Or, what if Student A informs a school official that the student heard from Student B that Student C "might be carrying a gun in his underwear." Assuming Students A and B are relatively credible people and that Student B is unavailable, can the official strip search Student C on the basis that the serious danger posed by a gun at school compensates for the weak evidence of its being hidden in Student C's underwear? An example of a conjunctive standard interpreted as a sliding scale is reflected in Chief Justice Rehnquist's view of the two-pronged "*Aguilar/Spinelli*" test which required evidence of an informant's veracity or credibility (prong one) and of evidence of the basis of his knowledge in the particular case (prong two) in order to establish probable cause from information he provides. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 131 (2d ed. 1997). Rehnquist said of the relationship of the two prongs: "[These two prongs] are better understood [to mean that] a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other." Illinois v. Gates, 462 U.S. 213, 233 (1983).

It is simply not possible from the Court's opinion to discern which formulation is intended.[55] Until the Court identifies which formulation is applicable, *Redding* cannot possibly provide adequate guidance in assessing the constitutionality of student strip searches.

In addition to the conjunctive/disjunctive confusion, *Redding* raises other problems. As will be discussed, the danger factor of the *Redding* standard invites troubling judicial excursions into educational policy matters. Moreover, *Redding* fails to mention certain controversial issues which, while not raised by the facts of the case, might nevertheless have been addressed in *dicta* in order to provide some guidance to courts certain to confront the issues in future cases.

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[55] In promulgating the conjunctive version of the standard, the Court suggested that satisfying its dictates was necessary as the "missing" component required to justify Redding's search. *See supra* note 34 and accompanying text and note 53. On the other hand, in articulating the disjunctive version, the Court specified that it was thereby "[making] clear" the degree of support necessary to satisfy *T.L.O.*'s reasonable scope requirements. *See supra* note 35 and accompanying text. The Court articulated the disjunctive version twice in its opinion, 129 S. Ct. at 2637, 2643, while presenting the conjunctive version only once, *id.* at 2643, perhaps suggesting a preference for the disjunctive version. In his dissent, Justice Thomas refers to both versions without noting the difference, *id.* at 2649 (Thomas, J., concurring in part and dissenting in part) (disjunctive), 2651 (seeing the majority test as permitting strip searches "only if" the item searched for was "sufficiently dangerous," thus assuming the conjunctive formulation). That the Court in fact favors the disjunctive version finds support in its observation that "nondangerous school contraband does not raise the specter of stashes in intimate places." *Id.* at 2643 (majority opinion). By negative implication, if nondangerous contraband did raise such a specter, a search of "intimate places" would apparently be justified thus negating any requirement that "stash" pose a "danger."

2. The Danger Factor

The *Redding* Court found that the threat posed by the pills suspected to be on *Redding*'s person did not pose sufficient "danger" to justify the strip search. The Court did not indicate whether the danger factor is meant to address only the risk of harm to the particular student searched, to students other than the one searched, or whether it also entails risk of harm to the broader educational environment.[56] Apart from suggesting that suspicion of "large amounts" of prescription strength ibuprofen or over-the-counter Advil or Aleve would have sufficed,[57] the Court offered no further explanation of the "danger" factor. What constitutes a "large amount" of such pills is unclear, particularly in light of the fact that it does not take many of these pills ingested by a single student to constitute a "dangerous" overdose. The only guidance provided by the *Redding* Court on this matter ends up being that under the particular circumstances of the case, the quantity of the suspected pills was insufficient to constitute a danger.

Presumably even small quantities, perhaps even a single dose or hit, of more inherently dangerous drugs than those involved in *Redding* could also justify strip searches.[58] If so, however, it would appear to place educators in the position of being forced to assess the relative "dangers" of various drugs, imposing upon them the very role of "pharmacologist" expressly rejected as unrealistic by the Court.[59]

As with its impact on controlling the presence of legal drugs in schools, *Redding* raises unanswered questions about whether or under what circumstances possession of illegal drugs pose a sufficient "danger" to justify strip searches. While the Court earlier has recognized the evils posed by such drugs in school[60] and has therefore granted educators broad search powers,[61] it is unclear how *Redding*'s recognition of the "categorically distinct" nature of strip searches impacts the educational interest in keeping schools drug free. For example, as illustrated by the above discussion of legal drugs,[62] does the "danger" posed by a given drug depend upon its quantity? Would possession of a single marijuana cigarette pose sufficient danger to justify a strip search? If not, would any number suffice? If so, how many? Would the answers be different for possession of a single dose of methamphetamine or rock of crack cocaine?

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[56] Under its initial formulation of the danger factor, the Court specified "danger to students" while subsequently describing it more generally as a "suspicion of danger." *See supra* notes 34-35 and accompanying text; *see also infra* notes 176-78 (discussing the *Galford* case which limited the danger inquiry to protecting students other than the one being searched).

[57] *See supra* note 30.

[58] For example, a cyanide tablet would constitute a grave health risk.

[59] *See supra* note 24.

Aside from drugs, other contraband may pose "danger" to students. Certainly deadly weapons, loaded guns for example, would appear to be items obtainable through strip searches,[63] but what about unloaded guns, water pistols or pea shooters,[64] darts, brass knuckles, or any other of numerous items that could constitute weapons and be hidden under a student's clothing? How "dangerous" are small explosive devices? While a stick of dynamite would certainly qualify, what about a single firecracker? It is impossible to tell whether the myriad items usable in one way or another as weapons in the hands of school students could pose sufficient danger to justify a strip search under *Redding*.

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[60] "School years are the time when the physical, psychological, and addictive effects of drugs are most severe" as children are more critically impaired by intoxicants and grow drug dependent more quickly than adults. Veronia Sch. Dist. 47J v. Acton, 536 U.S. 646, 661 (1995). These risks to student health and safety "make[s] the war against drugs a pressing concern in every school." Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002). Even though students possess free speech rights "The First Amendment does not require schools to tolerate . . . student expression that contributes to [the] dangers [of illegal drugs]." Morse v. Frederick, 551 U.S. 393, 410 (2007); *Acton*, 515 U.S. at 661.

[61] The Court has recognized an "important" perhaps even "compelling" interest in educators in protecting their schools from the influence of drugs. *Acton*, 515 U.S. at 661.

[62] *See supra* notes 57-59 and accompanying text.

[63] The *T.L.O.* Court noted the "major social problems" created by the influx of "drug use and violent crime" in the schools, certainly including those committed with various weapons. New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).

[64] "Every adult remembers from his own school days the havoc a water pistol or peashooter can wreak until it is taken away." *Id.* at 352 (Blackmun, J., concurring).

Apart from drugs and weapons, could other items of contraband qualify as "dangerous" for purposes of the *Redding* standard? For example, assuming that the danger factor extends both to protecting individual students and also to the educational environment in general, what about obscene or pornographic pictures or hate speech literature hidden beneath a student's clothing?[65] Is the "danger" entailed in such material the kind that permits a strip search? Would possession of a cell phone banned under a school rule aimed at preventing "sexting" be that kind of danger?[66] Could property stolen from a teacher or a fellow student and hidden beneath the student-thief's clothing constitute a *Redding* "danger" to the educational environment unless recovered and returned to its rightful owner?[67] Does "danger" under *Redding* always involve a future threat to the educational environment or might searches for evidence of past offenses posing no ongoing threat also suffice?[68]

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[65] *See* Cuesta v. Sch. Bd., 285 F.3d 962, 965-67 (11th Cir. 2002) (allowing a body cavity search of student at jail after she was arrested at school for distributing a pamphlet which depicted the school principal, an African American, with a dart through his head; contained an essay in which the author wondered "what would happen" if he shot the principal, teachers, or fellow students; and discussed the "African disease and immigrants who can't talk a fucking work of English" in cartoons depicting "violent and sexual activity").

[66] Such rules are becoming common. Education authorities in Houston, Texas recently enacted a new rule prohibiting "sexting"—the distribution of nude or semi-nude photographs by videos or text message at school. BRIETBART.COM, *Houston Schools Ban 'Sexting'* (Aug. 25, 2009), http://www.breitbart.com/article.php?id=CNG.60b96f71bf4ba4781f8a5d3a49a22a0e.4a1 (last visited Sept. 22, 2010). It is not clear whether the Houston rule prohibits possession of cell phones themselves at school. *See also* Aldrea Billups, *School Districts Hope Students get the Picture about 'Sexting' Dangers*, WASH. TIMES, July 23, 2009, at A1 (describing sexting ban in Bradenton, Florida schools and plans in Miami to develop a comprehensive program to deal with sexting).

[67] *See* Kennedy v. Dexter Consol. Schs., 10 P.3d 115, 122 (N.M. 2000) (deeming the theft of a student's diamond ring at school a "non-dangerous" infraction). *But see* Rogers v. Bd. of Educ., 749 A.2d 1173, 1176 (deeming the theft of forty dollars during gym class "a serious problem" that if not resolved immediately could lead to violence outside the school given that students in the school came from a variety of neighborhoods with a history of inter-neighborhood fighting). *See infra* notes 176-87 and accompanying text.

[68] For example, might evidence used in cheating on an exam concealed beneath the cheating student's clothing constitute sufficient educational "danger" to justify a strip search?

Clearly, *Redding* introduces a new element of vagueness into student search and seizure law, imposing judges as the arbiters of relative "dangers" to the educational environment. It is difficult to see such imposition as anything other than the "second guessing" of school officials by "courts lacking the experience to appreciate [the educational issues involved]" which the *Redding* Court itself supposedly condemned.[69]

3. The In the Underwear Factor

In addition to dangerousness, the *Redding* Court identified a second factor to be considered when assessing the constitutionality of strip searches: whether the searcher reasonably suspected resort to underwear for hiding evidence of wrongdoing. The Court did not elaborate on what might constitute adequate suspicion apart from pointing out that the assistant principal did not have "any reason" to suppose that Redding was carrying pills beneath her clothing.[70] "Some reason" to so suppose is thus necessary, although the Court offered little hint at the quantity or quality of evidence necessary. The Court did point out that "nondangerous school contraband does not raise the specter of stashes in intimate places," thus suggesting that "dangerous contraband might raise such a specter.[71] The Court also observed that no evidence existed of a "general practice" among students at *Redding*'s school of hiding contraband of any kind in their underwear,[72] again suggesting that evidence of such a practice might have justified the strip search.

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[69] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2640 n.1 (2009); *see supra* note 24 and accompanying text.

[70] 129 S. Ct. at 2643.

[71] *Id.* at 2642. This does not necessarily mean that the contraband be "dangerous" as a precondition of a valid strip search thus requiring a conjunctive standard requiring both dangerous contraband and reason to believe it is hidden in the student's underwear. Rather, the point seems to be that dangerous contraband carries evidentiary weight in determining, other things being equal, reason to believe contraband is hidden in underwear. It thus appears that the in the underwear factor could be satisfied if school authorities have particular reason to believe that a student has hidden nondangerous contraband in her underwear.

[72] *Id.*

While *Redding* is helpful in determining the permissibility of strip searching student offenders who "resort to underwear for hiding evidence of wrongdoing,"[73] the case offers little guidance in assessing the constitutionality of strip searches motivated by interests in gathering evidence of wrongdoing from students who have not themselves violated school rules but have instead been victimized by the wrongdoing. For example, is a nonconsensual strip search of a female student permitted if the purpose is to obtain evidence of a sexual assault which school officials suspect has just occurred?[74] Is such an intrusion a "strip search" within *Redding* or a "physical examination" governed by other considerations?[75] If a strip search under *Redding*, does the fact that the student being searched is not herself being accused of wrongdoing render the intrusion less "embarrassing, frightening and humiliating" than the search in *Redding*[76] so as to lessen the burden required to justify the intrusion? Or is the message of *Redding* that strip searches will be permissible only where students "resort to underwear for hiding evidence of wrongdoing"?

Finally, unlike its approach in *T.L.O.*, the *Redding* Court offered no indication of whether strip searches ever could possibly be justified in the absence of prior individualized suspicion of the student subjected to the search.[77] Such suspicion was not required in either *Acton* or *Earls*, the two school search decisions handed down by the Court after *T.L.O.* and prior to *Redding*.[78] It is thus not clear whether the "categorically distinct" context of strip searches requires individualized suspicion as a prerequisite to their constitutionality.[79]

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[73] *Id.* at 2643.

[74] *See* Teague v. Tex. Indep. Sch. Dist., 386 F. Supp. 2d 893, 896-97 (S.D. Tex. 2005) (noting that the alleged strip search of a student believed to have been sexually assaulted was not the result of official policy for which the school district might be held liable); Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 32-39 (1992) (describing strip searches of suspected victims of child abuse, some occurring in schools).

[75] The intrusion would surely be a Fourth Amendment "search" constituting infringements of the student's actual and reasonable "expectation of privacy." Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[76] *See supra* note 29 and accompanying text.

[77] Both *T.L.O.* and *Redding* involved cases where the school official conducting the search had suspicion that the particular student searched had violated a school rule. *See supra* note 9. Nevertheless, the *T.L.O.* Court anticipated the possibility that "reasonable suspicion" justifying the kind of search involved in that case might exist in the absence of "individualized suspicion." New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985). While noting that "some quantum" of such suspicion is "usually a prerequisite to a constitutional search or seizure, the Fourth Amendment imposes no irreducible

4. Other Unaddressed Matters

In addition to uncertainties centered in the two-factor standard articulated by *Redding*, the Court's silence on a variety of other matters[80] lessens the utility of the opinion to resolve the variety of issues presented in strip search cases. Of course, if the Court had anticipated matters not directly raised in *Redding* and addressed them in the opinion, any such views would have constituted obiter dictum leaving the issues still unresolved.[81] Nevertheless, the Court has historically offered *dicta* in a host of important cases as a means of offering some guidance as to how it might proceed in future cases presenting new facts.[82]

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requirement of such suspicion." *Id.* Of course, the *Acton* and *Earls* cases subsequently made clear that individualized suspicion is not a necessary condition under the "reasonable suspicion" standard applicable to school searches. *See supra* note 8.

[78] *See supra* note 8.

[79] The *Redding* Court made no mention of either *Acton* or *Earls*. The individualized suspicion issue is addressed in more detail *infra* notes 98-103 and 136-41 and accompanying text.

[80] *See infra* notes 87-114 and accompanying text.

[81] Because federal courts are "limited to the case or controversy before them," they "cannot prospectively set forth a precise code of rules regulating student searches in general because, in doing so, they would step outside the bounds of the judiciary and usurp the role of the legislative . . . branch." Gartner, *supra* note 2, at 956.

[82] Sometimes the Court offers "dictum" which is nevertheless understood as part of the Court's holding in a given case. For example, in *United States v. Place*, 462 U.S. 696, 707 (1983), the Court held that seizure of luggage at an airport constituted a violation of the Fourth Amendment but went on to add that a subsequent dog sniff of the luggage was not a "search" for Fourth Amendment purposes. The dog sniff discussion was clearly unnecessary to the outcome in the case and thus dictum, yet numerous cases have since assumed the fact that dog sniffs of property are not Fourth Amendment searches. *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 409 (2005). Sometimes the Court offers *dicta* in the body of its opinion in apparent attempts to limit the scope of its opinion. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that homosexual sodomy between consenting adults in private could not be criminalized, Court noting specifically that case did not involve: minors, individuals "who might be injured

The *T.L.O.* case itself presents a clear example. In a series of footnotes, the *T.L.O.* Court alluded to several issues not presented in the case.[83] Particularly significant was the Court's discussion of the question of whether the reasonable suspicion standard articulated in *T.L.O.* required individualized suspi-

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or coerced or who are situated in relationships where consent might not easily be refused," public conduct or prostitution, or whether the government must give "formal recognition to any relationship that homosexual persons seek to enter"); Payton v. New York, 445 U.S. 573, 582-83 (1980) (holding that arrest warrants are required to arrest suspects in their home, "put[ting] to one side other related problems that are not presented" such as whether exigent circumstances existed justifying warrantless entries and whether police can enter a third party's home to arrest a suspect); Massiah v. United States, 377 U.S. 201, 207 (1964) (holding a Sixth Amendment violation of right to counsel where government deliberately elicits a confession from indicted suspect with lawyer present—"we do not question that in this case . . . it was entirely proper to continue an investigation of the suspected criminal activities of the defendant . . . even though [he] had already been indicted"). The Court routinely offers *dicta* in footnotes. *See, e.g.*, California v. Carney, 471 U.S. 386, 394 n.3 (1985) (holding automobile exception to warrant requirement applicable to a motor home but "not pass[ing]" on situations where motor homes are used in ways "objectively indicat[ing] [their] being used as a residence" based on factors such as "circumstances of . . . location," ready mobility as opposed to being "elevated on blocks" and "connected to utilities"); New York v. Belton, 453 U.S. 454, 461 n.4 (1981) (warrantless search of automobile's passenger compartment permissible incident to arrest of driver, "holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk"); Arkansas v. Sanders, 442 U.S. 753, 765 n.13 (1979) (luggage taken from taxi by police afforded protection under the warrant requirement but "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment," e.g., burglar tools or a gun case); Ingraham v. Wright, 430 U.S. 651, 669 n.37 (1977) (Cruel and Unusual Punishments Clause limited to "criminal" punishments and thus not to school corporal punishment but "We have no occasion in this case, for example, to consider whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment").

For a discussion of the virtues of broad Supreme Court decisions including helpful dicta, see generally Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1 (2009).

[83] *See* New Jersey v. T.L.O., 469 U.S. 325, 333 n.3 (1985) (legality of search "implies no particular resolution of the question of the applicability of the exclusionary rule" in school cases); *id.* at 337 n.5 (opinion does "not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies"); *id.* at 341 n.7 ("This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with . . . law enforcement agencies, and we express no opinion on that question.").

cion of the student searched.[84] Such discussion was *dicta* in *T.L.O.* given the fact that individualized suspicion existed in the case.[85] Nevertheless, the *dicta* proved helpful in anticipating the Court's later holdings in *Acton* and *Earls* which rejected an individualized suspicion requirement.[86]

Thus, in a similar fashion the *Redding* Court could have provided some helpful *dicta* addressing issues that will continue to trouble the lower courts. The following are some such issues.

a. *Must School Officials Exhaust "Less Drastic Alternatives"?*

Throughout its Fourth Amendment jurisprudence, the Supreme Court has consistently refused to apply a "less drastic alternatives" approach in deciding whether a given search or seizure was constitutional. Thus, if the police could have achieved their law enforcement interests by employing measures more respectful of privacy interest than those chosen, the chosen methods are upheld so long as they meet minimal Fourth Amendment standards.[87] Similarly, in the school search context, the Court has granted broad deference to school officials in holding that they need not conduct their searches of students in the least intrusive manner so long as the searches are otherwise reasonable.[88]

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[84] *See id.* at 342 n.8.

[85] *See supra* note 9.

[86] The Court hinted in its *T.L.O. dicta* that individualized suspicion might not be required as a prerequisite for valid school searches, noting that such suspicion is sometimes dispensed with in situations "where the privacy interests implicated by a search are minimal" and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" 469 U.S. at 342 n.8 (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)). While the *T.L.O.* Court recognized that students possess legitimate privacy expectations at school, its application of the sliding scale, balancing approach arguably left student privacy in fact minimally protected. *See* Gardner, *supra* note 15, at 919-25; Gardner, *supra* note 47, at 378-80. These considerations led the author to predict that the Court would not require an individualized suspicion requirement, thus anticipating the outcomes in *Acton* and *Earls*.

> While stating that its holding leaves open the individualized suspicion issue, the Court immediately cited cases which dispense with the usual prerequisite of individualized suspicion. The Court then provided a test for determining when unparticularized searches are permissible: when privacy interests are "minimal" and when "other safeguards" are available to check the discretion of the searcher. When applied to school searches, this test may permit searches unsupported by individualized suspicion. Despite its talk to the contrary, student privacy interests do appear 'minimal' after T.L.O., and a variety of 'safeguards'—parent pressure, administrative regulation, public scrutiny—exist to control the discretion of school officials conducting unparticularized searches.

Gardner, *supra* note 15 at 924, n.134 (citations omitted).

Yet with the *Redding* Court's recognition that student strip searches are "categorically distinct" from other intrusions, it is plausible to suppose that the Court might be inclined to join several lower courts in embracing a less drastic alternative requirement in the context of strip searches.[89] Assuming that a strip search is permitted under *Redding*'s two-factor standard, a less drastic alternative requirement may still be relevant. For example, may school officials having reasonable suspicion that a student is hiding dangerous contraband in their underwear require the student to *totally* strip or must the officials first conduct the "less drastic" partial strip process evidenced in

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[87] The Court has repeatedly held that "the reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." Illinois v. Lafayette, 462 U.S. 640, 647 (1983); *see also* Atwater v. City of Lago Vista, 532 U.S. 318, 350 (2001); Colorado v. Bertine, 479 U.S. 367, 373-74 (1987). In explaining its reluctance to embrace a less drastic alternative requirement, the Court has said: "The logic of such [a requirement] could raise insuperable barriers to the exercise of virtually all search and seizure powers," United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 n.12 (1976), "because judges engaged in *post hoc* evaluations of government conduct 'can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished.'" Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 629 n.9 (1989) (quoting United States v. Sharpe, 470 U.S. 675, 686-87 (1985)).

[88] Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995) (refusing to require the "less intrusive" means of drug testing students on the basis of individualized suspicion of drug use in lieu of the school's choice to test all student athletes without individualized suspicion); Bd. of Educ. v. Earls, 536 U.S. 822, 837 (2002) ("Reasonableness under the Fourth Amendment does not require employing the least intrusive means.").

[89] *See, e.g.*, Bell v. Marseilles Elementary Sch., 160 F. Supp. 2d 883, 889 n.6 (N.D. Ill. 2001) (criticizing police officer who strip searched students for "not . . . using the least intrusive means of finding the [evidence of wrongdoing]"); Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1203 (D.S.D. 1998) (finding fault with strip searches made before "less intrusive" searches of lockers or motor vehicles); Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 833 (11th Cir. 1997) (teachers who launched strip searches did so foregoing several reasonable "less intrusive means" available to achieve the ends of the search) (Kravitch, J., dissenting).

Redding which allowed the student to continue to wear her underwear?[90] Should school officials be required to conduct a "*Terry* frisk,"[91] an arguably less drastic alternative to a strip search,[92] as a prerequisite to a strip search?[93] Or, as argued by *amicus* in *Redding*, must a hand held metal detector be utilized as a prerequisite to a strip search in situations where school officials reasonably suspect that weapons are hidden beneath a student's clothing?[94]

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[90] *See* Fewless *ex rel.* Fewless v. Bd. of Educ., 208 F. Supp. 2d 806, 820 (W.D. Mich. 2002) (assuming an otherwise constitutionally-justified search, requiring a student to shake his underwear, while not exposing himself, is less intrusive than a total strip search and thus presumably constitutionally required under a "least intrusive" analysis). Such a requirement would raise further questions. If the partial strip process is employed initially and no contraband is discovered, would school authorities necessarily lose their reasonable suspicion to conduct a more intrusive "total strip" search? *See infra* notes 193-226 and accompanying test (discussing *Fewless* in detail).

[91] Terry v. Ohio, 392 U.S. 1 (1968) (permitting police officer to patdown, "frisk," the outer clothing of a suspect whom the officer has "reasonable suspicion" to believe might be armed with a weapon).

[92] On the one hand, *Terry* frisks are generally viewed as less intrusive than full-fledged searches of the person, WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE 660 (4th ed. 2004) (*Terry*-frisk is less extensive than a search of the person incident to arrest); Brousseau *ex rel.* Brousseau v. Town of Westerly, 11 F. Supp. 2d 177, 181-82 (D.R.I. 1998) ("pat down" search of areas around student's pockets and ankles deemed "limited" and "least intrusive" under the circumstances). On the other hand, however, in the context of school searches because it involves physically touching the person of the student, a *Terry*-frisk is sometimes viewed as *more* intrusive than a strip search. *See* Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993) (holding that since school officials' suspicion that student was "crotching" drugs, a strip search was less intrusive than "physically touching" him). *See also* Singleton *ex rel.* Smith v. Bd. of Educ., 894 F. Supp. 386, 389 (D. Kan. 1995) (school official "patted the [student] plaintiff down in the crotch area").

[93] *Redding*, of course, leaves unanswered whether a more drastic alternative to a strip search, a body cavity search, would ever be justified assuming school officials have reasonable suspicion that a student is hiding dangerous contraband in a body cavity. *See* Cuesta v. Sch. Bd., 285 F.3d 962, 969-70 (11th Cir. 2002) (body cavity search at jail constitutionally permissible after student was arrested at school for distributing "hate crime" pamphlet). Are such intrusions themselves "categorically distinct" from strip searches so as to require more stringent justification if permitted at all? *See* Tarter v. Raybuck, 742 F.2d 977, 982 (6th Cir. 1984) ("The authority of the school official would not justify a degrading body cavity search of a youth in order to determine whether a student was in possession of contraband."). In some circumstances a body cavity search has actually been deemed more "reasonable" than a partial strip search along the lines of that conducted in *Redding*. *See* Fewless *ex rel.* Fewless v. Bd. of Educ., 208 F. Supp. 2d 806, 810, 820 (W.D. Mich. 2002) (pulling back the waistband of student's boxer shorts and looking at his buttocks is less reasonable than a body cavity search where suspicion exists that student has hidden marijuana in his "buttcrack").

b. Require Parental Notification?

Similar to a requirement to exhaust less drastic alternatives, parental notification is suggested by some courts as a prerequisite to valid strip searches.[95] Parental notice prior to the search allows the parent the opportunity to be present when the search occurs,[96] thus perhaps ameliorating the student's anxiety.[97]

c. Is Individualized Suspicion a Prerequisite for Permissible Strip Searches?

As mentioned above, the *T.L.O.* Court offered enlightening *dicta* on individualized suspicion as it relates to findings of reasonable suspicion.[98] Thus far, in the only cases raising the issue, the Court has held that individualized suspicion is not a necessary condition for the presence of reasonable suspicion.[99]

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[94] *See* Brief for the National Association of Social Workers and its Arizona Chapter et al. as Amici Curiae Supporting Respondent April Redding, 24, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479).

[95] *See, e.g.*, *Fewless* ex rel. *Fewless*, 208 F. Supp. 2d at 814 (finding that a student had been subjected to an unconstitutional strip search, court noted that "his parents were not called" prior to the search). In some contexts involving infringements of young peoples' liberty interests, the Supreme Court has required parental notification, *see, e.g.*, *In re* Gault, 387 U.S. 1, 33 (1967) (child and his parents must be notified of charges in delinquency proceedings against the child), while in others the Court has not required parental notification, *see, e.g.*, Goss v. Lopez, 419 U.S. 565, 583-84 (1975) (student entitled to notice of charges against him in school suspensions of ten days or less, no mention of requirement to notify parents). Moreover, while never holding that parental consent is necessary for searches of school children, the Court has recognized that parental acquiescence is relevant determining the constitutionality of a given school search policy. In upholding the urinalysis searches in *Acton*, the Court observed: "[T]he primary guardians of [the] schoolchildren appear to agree [with the school search policy]. The record shows no objection to this districtwide program by any parents other than [respondents]." Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995).

[96] *See* Farmer v. State, 275 S.E.2d 774, 775-76 (Ga. Ct. App. 1980) (school officials calling student's mother as well as police as a consequence of suspicion that student possessed marijuana at school; mother present at subsequent strip search).

[97] Whether presence of a parent at a strip search would decrease the student's anxiety is of course dependent on a variety of circumstances. Parental presence in some cases may in fact increase the student's anxiety. In some circumstances, parental presence might eliminate the need for a strip search altogether if the parents induce a guilty student himself to turn over contraband he had hidden in his underwear.

In the "categorically distinct" context of strip searches, however, there is reason to believe that individualized suspicion might play a more important role, particularly in light of numerous lower court cases invalidating strip searches for want of individualized suspicion.[100] Given the fact that school authorities historically have with some regularity conducted mass strip searches of students without individualized suspicion,[101] it is probably only a matter of time before the Supreme Court will be required to address the issue. Some indication in *Redding* by way of *dicta* as to whether strip searches are sufficiently distinct from the searches approved in *Acton* and *Earls* so as to require individualized suspicion would no doubt be helpful to school officials in gauging the constitutionality of non-particularized strip searches.[102] *Redding*'s silence on the matter in light of the *T.L.O. dicta* and the *Acton* and *Earls* holdings may create in school officials the impression that individualized suspicion is not a prerequisite for valid strip searches, notwithstanding lower court case law to the contrary. If such an impression is in fact ultimately false, much student privacy might have been protected by cautionary *dicta* in *Redding.*[103]

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[98] *See supra* notes 84-86 and accompanying text.

[99] *See supra* notes 84-86 and accompanying text.

[100] *See, e.g.*, Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 605-06 (6th Cir. 2005); Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160, 1177 (11th Cir. 2001); H.Y. *ex rel.* K.Y. v. Russell Cnty. Bd. of Educ., 490 F. Supp. 2d 1174, 1184-85 (M.D. Ala. 2007); Carlson *ex rel.* Stuczynski v. Bremen High Sch. Dist. 228, 423 F. Supp. 2d 823, 826-27 (N.D. Ill. 2006); Rudolph *ex rel.* Williams v. Lowndes Cnty. Bd. of Educ., 242 F. Supp. 2d 1107, 1115-16, (M.D. Ala. 2003); Bell v. Marseilles Elementary Sch., 160 F. Supp. 2d 883, 887-88 (N.D. Ill. 2001); Konop *ex rel.* Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1206-07 (D.S.D. 1998); Kennedy v. Dexter Consol. Schs., 10 P.3d 115, 120-22 (N.M. 2000).

[101] *See supra* note 100; *see also* Oliver *ex rel.* Hines v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995) (strip search of entire gym class in search of stolen money without individualized suspicion); Rogers v. Bd. of Educ., 749 A.2d 1173 (Conn. 2000) (same); Lamb v. Holmes *ex rel.* A.L., 162 S.W.3d 902 (Ky. 2005) (alleged strip search of entire gym class in search of stolen shorts without individualized suspicion).

[102] The reported lower court cases suggest that absence of individual suspicion renders subsequent strip searches unconstitutional. *See supra* note 100.

d. The Meaning of T.L.O*'s "Age and Sex of the Student" and "Nature of the Infraction" Factors: Continued Uncertainty*

As noted, the *T.L.O.* Court identified the "age and sex of the student" and the "nature of the infraction" as relevant factors in assessing whether student searches are reasonable in their scope.[104] While *Redding* offered possible elucidation of the nature of the infraction consideration,[105] the Supreme Court has offered no guidance as to the meaning of the age and sex of the student factors. Assuming that the *T.L.O.* rubric applies to constitutional assessments of strip searches,[106] courts are presently required to guess at the relative importance and meaning of the age and sex factors.[107]

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[103] To the extent that individualized suspicion is not "clearly" a prerequisite for valid strip searches, school officials enjoy qualified immunity for non-individualized, otherwise reasonable, strip searches should such eventually be found unconstitutional for want of individualized suspicion. *See supra* note 1.

[104] *See supra* notes 12-15 and accompanying text.

[105] *See supra* notes 43-48 and accompanying text. This interpretation suggests that courts are now free to assess the relative dangers under school rules in determining whether searches for evidence of their violation are reasonable in their scope. Despite the questionable basis for this interpretation offered by the *T.L.O.* Court itself (*see supra* notes 15, 44-45 and accompanying text), some lower courts have embraced it. *See, e.g.*, *Thomas* ex rel. *Thomas*, 261 F.3d at 1168-69 (theft by a student does not constitute "an extreme threat to school discipline or safety" so as to justify strip searching suspected grade school students); Cornfield *ex rel.* Lewis v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1320 (7th Cir. 1993) ("a highly intrusive search in response to a minor infraction would . . . not comport with [the *T.L.O.* standard]." Justice Thomas has suggested a more modest understanding of the "nature of the infraction" factor interpreting it to mean only that searchers must confine their searches to areas where the object of the infraction could be concealed. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2649 (2009) (Thomas, J. concurring in part and dissenting in part). Thus, if school officials have reason to believe a student possesses a rifle, they can search only places where rifles might be. *Id.*

[106] *See supra* notes 31-32, 40-51 and accompanying text.

[107] One court expressed its frustration as follows: "[*T.L.O.* offers] a series of abstractions" couched in language "lack[ing] specificity" seemingly rendered by the Court "[on] purpose []." Jenkins *ex rel.* Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 827-28 (11th Cir. 1997). The court added:

> In the absence of detailed guidance, no reasonable school official could glean from these broadly-worded phrases whether the search of a younger or

Attempts to give meaning to the age and sex factors present a variety of interpretations. Regarding the age factor, one view holds that, other things being equal, younger students should receive greater protection from invasive searches than older ones,[108] while another embraces exactly the opposite position that older students, particularly adolescents, are more traumatized by such searches than younger students[109] and thus should receive greater protection from strip searches than their younger counterparts.

As for the sex of the student factor, again several views have been forwarded as to how it should impact analysis. The most common understanding focuses not simply on the sex of the student but also on the sex of the person conducting the search, making the assumption that searches by persons of the opposite sex of the student are more intrusive than those by

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> older student might be deemed more or less intrusive; whether the search of a boy or girl is more or less reasonable, and at what age or grade level; and what constitutes an infraction great enough to warrant a constitutionally reasonable search or, conversely, minor enough such that a search of property or person would be characterized as unreasonable.

Id. at 825-26. Another court expressed a similar view: "A diligent but unsuccessful search for . . . guidance . . . leads us to a troubling conclusion: the . . . standard articulated in . . . *T.L.O.*, has left courts . . . reluctant or unable to define what type of official conduct would be subject to a . . . cause of action [for violation of students' Fourth Amendment rights]." Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 886 (6th Cir. 1991).

[108] *See* Brief for the National School Boards Association et al. as Amici Curiae in Support of Petitioners, at 17, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479) ("As for the age factor, it is reasonable to require educators to restrict themselves to less invasive searches for younger students."). Support for this interpretation of the age factor may come from the fact that younger students, unlike their older counterparts who undress at school for gym classes, have a greater expectation of bodily privacy than older students. *See* Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) (student athletes have reduced expectation of privacy because they experience "suiting up" and situations of communal undress).

[109] One court expressed the point this way:

> The impact of the search will also vary with the age of the child. Perhaps counterintuitively, a very young child would suffer a lesser degree of trauma from a nude search than an older child. As children go through puberty, they become more conscious of their bodies and self-conscious about them. Consequently, the potential for a search to cause embarrassment and humiliation increases as children grow older.

Cornfield ex rel. *Lewis*, 991 F.2d at 1321 n.1.

persons of the same sex.[110] The sex of the student factor may be relevant in other ways, however. Searches of female students, for example may potentially be deemed more intrusive than those of males given the possibility that female students might be menstruating and might thus be especially self-conscious about their bodies.[111] Moreover, the sex of the student factor may be relevant in that students of one sex may be more likely than those of the other to possess a particular type of contraband at school,[112] thus perhaps justifying a lower threshold for searches of students of the sex deemed more likely to possess the given contraband.[113]

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[110] This assumption is borne out by the case law which evidences that strip searches are most often conducted by school officials of the same sex as the student being searched. *See, e.g.*, *Redding*, 129 S. Ct. at 2638 (female officials searching female student); Rudolph *ex rel.* Williams v. Lowndes Cnty. Bd. of Educ., 242 F. Supp. 2d 1107, 1116 (M.D. Ala. 2003) (males searching male); West Virginia *ex rel.* Galford v. Mark Anthony B., 433 S.E.2d 41, 42-43 (W.V. 1993) (male searching male). *But see* H.Y. *ex rel.* K.Y. v. Russell Cnty. Bd. of Educ., 490 F. Supp. 2d 1174, 1179, 1186 (M.D. Ala. 2007) (female officials putting hands into male student's pockets).

[111] Laura L. Finley, *Examining School Searches as Systemic Violence*, 14 CRITICAL CRIMINOLOGY 117, 128 (2006). For a case where a student was menstruating at the time of a strip search, see Konop *ex rel.* Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1203 (D.S.D. 1998). While not directly relevant to assessments of the sex of the student factor in the context of strip searches, searches of student property unique to one sex are sometimes deemed especially intrusive. As Justice Brennan observed in his dissenting opinion in *T.L.O.*, searching a female student's purse poses a substantial invasion of privacy:

> A purse typically contains items of highly personal nature. Especially for shy or sensitive adolescents, it could prove extremely embarrassing for a teacher or principal to rummage through its contents, which could include notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene.

469 U.S. 325, 355 n.1 (Brennan, J., concurring in part and dissenting in part).

[112] For example, teenage girls tend to abuse prescription drugs more readily than do boys. Office of National Drug Control Policy, *Females Bucking Traditional Drug Abuse Trends: Teen Girls, Young Women Now Outpace Male Counterparts for Prescription Drug Abuse, Dependence* (Apr. 30, 2007). Male students, on the other hand, may be more likely to bring weapons to school. *Cf.* Thompson *ex rel.* Lea v. Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996) (school officials search all male students on suspicion that *some* student might possess a knife or gun at school; no explanation of why it was reasonable to limit the search to male students).

[113] Such a view smacks of "sexual profiling" and might raise serious equal protection questions. No equal protection issues were raised, however, in the *Thompson* case, *supra* note 112, where all of the male, and none of the female, student body was

Given the controversial nature of student strip searches, clarification from the Supreme Court of the considerations relevant to assessing their constitutionality is obviously desirable. A clear understanding of the age and sex of the student factors articulated in *T.L.O.* appears at least helpful, if not essential, in making such assessments. One would have hoped that the *Redding* Court would have taken the opportunity to offer some guidance as to the meaning of these factors by utilizing them in its analysis.[114]

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searched in a situation where the evidence did not necessarily implicate only male suspects. The search in *Thompson* was premised on a suspicion that someone in the school might possess a sharp object thought to have cut the seats of a school bus on the morning of the search.

[114] An additional matter in need of clarification is the issue of whether students are legally capable of consenting to school searches, and if so under what circumstances. While the Supreme Court has never addressed the problem, it perhaps offered some guidance in its decision in *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979) which held that a juvenile, a sixteen year old in that case, could constitutionally waive his *Miranda* rights if he did so "knowingly and intelligently" under the "totality of the circumstances," the same standard applicable to adults. The *Fare* Court rejected arguments that juveniles are entitled to special protections such as presence of an attorney or a parent as prerequisites to valid waivers. *Id.* The Court found that the validity of waivers depends on a consideration of all the circumstances, including an evaluation of the juvenile's "age, experience, education, background, . . . intelligence, and . . . whether he has the capacity to understand the [*Miranda*] warnings given him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights." *Id.* at 725. *Fare* might thus suggest that students, at least adolescents, are capable of consenting to searches by themselves, particularly in light of the Court's Fourth Amendment case law holding that consent to searches is valid so long as it is "voluntary" under the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Yet, in the context of student consent some lower courts have intimated that, unlike the *Miranda* waiver in *Fare*, students might have a right to "an opportunity to speak to someone who [is] an advocate for [them] like a parent, counselor, or attorney" as a prerequisite to valid consent to a school strip search. Fewless *ex rel.* Fewless v. Bd. of Educ., 208 F. Supp. 2d 806, 815 (W.D. Mich. 2002). Whether the Supreme Court would follow the *Fare* approach or require protections such as those suggested in *Fewless* as preconditions for valid consent to the "categorically distinct" intrusions entailed in strip searches is unclear. *Redding* presented an opportunity to address the consent issue in light of the fact that Redding consented to the searches of her clothing and backpack. *See supra* note 20 and accompanying text.

III. RETHINKING EXISTING CASE LAW UNDER *REDDING*

The above discussion establishes that *Redding* does not meet the goal of providing clear guidance[115] for those charged with assessing the constitutionality of school strip searches. As will be shown in this section, additional evidence of these deficiencies is revealed when representative samples of existing case law are rethought in terms of the *Redding* rubric and other Supreme Court case law. Such a process tests *Redding* as a vehicle for resolving troublesome strip search cases that have already come before the courts. *Redding*'s inadequacies will be revealed by discovering that the case neither confirms the courts' decisions in those cases nor clearly renders them incorrect. Rather, *Redding* simply calls the decisions into question without offering a firm basis for their resolution.

A. Doe v. Renfrow[116] *Dog Sniffs for Marijuana*

The *Doe* case arose as follows: concerned about alcohol, marijuana, and PCP use by students in the community's junior and senior high schools, school officials, in conjunction with law enforcement officers, devised a plan to conduct unannounced entries into the schools' classrooms with dogs trained to detect the odor of marijuana. All agreed that any evidence recovered during the investigation would not be used in juvenile or criminal court proceedings but only in school disciplinary actions against students found in possession of contraband.

The dogs sniffed each student in the schools and "alerted" to approximately fifty students. Of the fifty, eleven students were also subjected to strip searches when the dogs continued to alert to them after the students had emptied their pockets and purses. The searches revealed no drugs or other contraband. Junior high student Diane Doe subsequently brought an action for violation of the Fourth Amendment against the school officials who subjected her to a strip search.[117]

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[115] *See supra* note 2.

[116] 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd per curiam*, 631 F.2d 91 (7th Cir. 1981), *cert. denied* 451 U.S. 1022 (1981).

The *Doe* court found no Fourth Amendment violation entailed in the dog sniff of Doe[118] nor in the search of her pockets, given that the school officials had "reasonable cause to believe" that some students were violating school rules prohibiting drug activity at school[119] and particular suspicion of Doe because the dog had alerted to her. The strip search was another matter, however. The *Doe* court found that intrusion "unreasonable" in light of its infringement of the "individual's basic justifiable expectation of privacy."[120] Such infringement would be permissible only if supported by "some facts that provide a reasonable cause to believe the student possesses the contraband sought."[121] The continued dog alert was deemed insufficient reasonable cause for the strip search because in the court's eyes dogs react only to the "odor" of the prohibited substance not necessarily to the substance itself,[122] creating the possibility that the dog alerted to the odor of marijuana on Doe's clothing after she had inadvertently and innocently been exposed to its odor through another's use.[123]

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[117] The search was conducted in the school nurse's station by two female school officials who ordered Doe to remove her clothing. The officials allowed Doe to turn her back to them while she disrobed. The officials briefly examined her clothing and immediately permitted Doe to dress, presumably with her never turning around to face the officials. 475 F. Supp. at 1017.

[118] The issue of whether the dog sniff itself constituted a Fourth Amendment "search" is examined in detail by the author at Martin R. Gardner, *Sniffing for Drugs in the Classroom - Perspectives on Fourth Amendment Scope*, 74 NW. U. L. REV. 803 (1980). While the *Doe* court found that the dog sniff was not a search, other courts have found to the contrary. *See, e.g.*, Horton *ex rel.* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982), B.C. *ex rel.* Powers v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999).

[119] 475 F. Supp. at 1024. *Doe* was decided prior to *T.L.O.*, thus the "reasonable cause" standard utilized did not have specific Supreme Court recognition at the time.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Without elaboration, the court alluded to the possibility that the dog alert to Doe might have been triggered by an odor not associated with illegal drugs. "No marijuana or other drugs were found in [Doe's] possession, although it was later discovered that [she] had been playing with one of her dogs that morning of the search and that dog was in heat." *Id.* at 1017.

The *Doe* decision predated *T.L.O.* and, as in that case, rejected a probable cause requirement in lieu of the more lenient "reasonable suspicion" standard. While the court found insufficient "reasonable cause" to believe that Doe possessed contraband hidden beneath her clothing, the evidence could easily have yielded the opposite conclusion. If, as the court indicated, dogs are reliable detectors of contraband odor,[124] why was it not "reasonable" to believe that Doe had hidden contraband beneath her clothing, given the well-known fact that such hiding is common.[125] In a *post hoc* assessment of reasonableness, the court concluded that since no drugs were found through the strip search, the dog had to have alerted to the odor of Doe's clothing[126] thus supposedly making it unreasonable to believe that she might be carrying contraband beneath her clothing. While it may seem clear after the fact that the dog alerted to odors on Doe's clothing, how could the school officials have known this, or have had reason to know this, without conducting the strip search? It thus appears that the *Doe* court reached a questionable conclusion under its articulated standard.

In any event, our question is whether the *Redding* opinion provides a useful analytical tool to address the issues raised in *Doe*. Unfortunately, the exercise of rethinking *Doe* in light of *Redding* and the Court's other student search case law only reaffirms the points made earlier that a host of questions regarding the constitutionality of school strip searches remain unanswered.[127]

1. *Redding* and the Court's Prior School Search Cases

In assessing the constitutionality of the strip search in *Doe*, initial questions surround whether *Redding* alone provides the proper analytical standard or whether it should be supplemented by *T.L.O.*'s two-prong test.[128] Assuming that *T.L.O.* is intended to be used in conjunction with *Redding* in strip search cases,[129] the reasonableness of the "search" must be assessed both at its inception and in its scope.[130] This inquiry confronts the problem addressed earlier: in cases like *Doe* and *Redding*, is the strip search a Fourth Amendment event distinct from the earlier searches preceding it, thus requiring a justification "at its inception" separate from that of the earlier searches, or is it the culmination of a single increasingly intrusive search?[131] Under either interpretation, however, the constitutionality of the strip search cannot be assessed isolated from the earlier intrusions. If any of them constitute a search in violation of the Fourth Amendment, the strip search would be analogous to the "fruit of the poisoned tree" in exclusionary rule cases and thus also unconstitutional because of its causal linkage to the prior unconstitutional searches.[132] Thus an analysis of the constitutionality of the strip search in *Doe* must begin with an assessment of the reasonableness "at its inception" of the first intrusion arguably constituting a Fourth Amendment "search."

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[124] In fact, the *Doe* court noted that it is well established that well trained dogs may not merely provide "reasonable suspicion" to believe that contraband is present when they alert, but also "probable cause" to so believe. *Id.* at 1025-26.

[125] "[U]nderclothing [is] a prime hiding place for controlled substances," Rone *ex rel.* Payne v. Daviess Cnty. Bd. of Educ., 655 S.W.2d 28, 30 (Ky. Ct. App. 1983).

[126] *See supra* notes 122-23 and accompanying text.

[127] *See supra* notes 52-114 and accompanying text.

The first such intrusion is the dog sniff of Doe. If, as the *Doe* court held, the sniff was not a "search," it carried no Fourth Amendment consequences. However, the courts of two federal circuits have disagreed and held dog sniffs in similar circumstances to *Doe* to be Fourth Amendment searches.[133] Although the Supreme Court has found that dog sniffs of property are not searches under the Fourth Amendment,[134] it has not addressed the issue in the context of sniffs of people.[135] Thus the federal circuits are split on the issue and await Supreme Court clarification.

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[128] *See supra* notes 36-51 and accompanying text.

[129] As discussed above, the *Redding* Court cited the "reasonable scope" prong of *T.L.O.*'s two-prong test and arguably applied the "nature of the infraction" consideration under that prong in assessing the reasonableness of the strip search. *See supra* notes 41-46 and accompanying text. On the other hand, the *Redding* Court made no mention of the first prong of the *T.L.O.* test, the "justified at its inception" factor, nor did it apply the "age and sex of the student" considerations under the reasonable scope prong. Thus *T.L.O.* received only fleeting attention from the *Redding* Court, leaving uncertain its relevance as an analytical complement to *Redding* in resolving strip search issues.

[130] *See supra* notes 36-39 and accompanying text.

[131] *See supra* notes 36-39 and accompanying text.

[132] "[I]f it is determined that a Fourth Amendment violation has occurred it is apparent that the consequence must be suppression of . . . evidence" directly related to the prior violation. WAYNE R. LAFAVE, 6 SEARCH AND SEIZURE 255 (4th ed. 2004); *see, e.g.*, Parkhurst v. Trapp, 77 F.3d 707 (3d Cir. 1996) (search of private papers conducted as a consequence of an illegal entry into home where papers were kept held to also be illegal).

If the dog sniff was a search, it must be supported by "reasonable suspicion. The school authorities in *Doe* had understandable concerns about the drug problem in their school, but it is not clear whether the wholesale search of the entire student body was reasonable. While the Supreme Court has found "reasonable suspicion" for the unparticularized searches for drugs including marijuana in *Acton* and *Earls,*[136] neither of those cases involved searching an entire student body for marijuana alone[137] as was the case in *Doe*. The indiscriminate nature of dog sniffs of entire groups of students has been identified as a primary basis for finding such searches unreasonable by some courts disagreeing with *Doe* in situations not involving eventual strip searches.[138] For such courts, conclusions of unreasonableness would likely be reached even more readily in cases like *Doe* where the dog sniff leads to an eventual strip search.

On the other hand, there is little reason to read *Acton* and *Earls* as necessarily forbidding indiscriminate dog sniffs of entire student bodies.[139] Even if such intrusions constitute searches, they may well be deemed reasonable in light of the recognized evils of drugs in schools, the effectiveness of dogs in detecting their presence, and the perceived minimal intrusiveness of dog sniffs.[140] If so, utilizing the dog to detect Doe's possible possession of marijuana appears to be "reasonable at its inception."[141]

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[133] *See supra* note 118.

[134] *See supra* note 82 (discussing the *Place* and *Caballes* cases).

[135] The Court denied cert. in the *Doe* case. Doe v. Renfrow, 451 U.S. 1022 (1981).

[136] *See supra* notes 7-8.

[137] *Acton* involved searches of athletes only while *Earls* involved searches limited to students participating in extra-curricular school activities. *See supra* notes 7-8. Both *Acton* and *Earls* involved searches for amphetamines and cocaine in addition to marijuana while *Earls* also included searches for opiates and barbiturates. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 650 (1995); Bd. of Educ. v. Earls, 536 U.S. 822, 826 (2002).

[138] *See, e.g.*, Horton *ex rel.* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 481-82 (5th Cir. 1982) ("[C]anine inspection of the student's person . . . cannot be justified by the need to prevent abuse of drugs and alcohol when there is no individualized suspicion . . . .").

Assuming the reasonableness of the dog sniff, the alert to Doe provided reasonable suspicion, indeed perhaps even probable cause, to believe that she possessed or had recently smoked marijuana.[142] The subsequent search of her pockets was therefore reasonable.[143]

2. *Redding*'s Two Factor Standard

Regarding the strip search, its constitutionality depends essentially on how it fares under *Redding*'s two-factor standard.[144] As discussed above, that standard is rife with uncertainty.[145]

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[139] Commentators have stated the matter this way: "[D]og sniffs as part of a random, suspicionless search policy enjoy a presumption of validity after [*Acton* and] *Earls*." James & Larson, *supra* note 2, at 51.

[140] *Id.* Of course if dog sniffs are deemed not to constitute Fourth Amendment searches as held by the *Doe* Court, they would be without the scope of the Fourth Amendment altogether.

[141] It could be argued, however, that the search was unreasonable in its scope in that it was more intrusive than necessary to achieve its purposes. The students in Doe's school were each searched in the presence of their classmates. Thus the possible false alert to Doe was witnessed by her whole class, subjecting her to the humiliation of her fellow students suddenly assuming that she was a drug user. The dog sniffs could have been conducted in a manner more respectful to student privacy by having the dogs sniff the students privately rather than in the more public context of the classroom. As noted by dissenters favoring an individualized suspicion requirement in *Acton*: "[A]ny distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential." *Acton*, 515 U.S. at 677 (O'Connor, J., dissenting). Whether this "less drastic alternative" to the classroom search would be required by the Supreme Court is doubtful, however, given the Court's reluctance to impose such alternatives. *See supra* notes 87-94 and accompanying text.

[142] *See supra* note 124. The *Doe* Court's finding of reasonable suspicion through the alert of the dog is enhanced by the Supreme Court's later views in *United States v. Place*, 462 U.S. 696, 707 (1983), in which it found sniffs of property by a well-trained canine to be "*sui generis*" in the sense that the "sniff discloses only the presence or absence of narcotics" and thus constitutes an effective and minimally intrusive investigative technique.

[143] The search of Doe's pockets is similar to the search of T.L.O.'s purse which the Court upheld as supported by "reasonable suspicion." *See supra* note 9.

As an initial ambiguity, whether *Redding*'s two factors constitute a conjunctive or disjunctive standard[146] raises obvious difficulties. Is it necessary to show *both* that the school officials had reason to believe that Doe's possible possession of marijuana constituted a "danger" to the educational environment *and* that they had reason to believe she had hidden the marijuana under her clothing, or will a showing of *either* suffice? As will be shown, the facts of *Doe* provide evidence of both prongs but whether such is sufficient "reason" to search under either is simply not clear. Thus, whether the *Redding* factors are conjunctive or disjunctive they offer little assistance in determining the constitutionality of the strip search of Doe.

a. The Danger Factor

As for the first, the "danger" factor, the school officials strip searched Doe because they believed she possessed marijuana. While the *Acton* and *Earls* Courts found the substance's possible presence along with other illegal drugs at school sufficiently serious to justify unparticularized urinalysis of significant segments of the school population,[147] does the presence of marijuana alone constitute sufficient "danger" to justify the "categorically distinct intrusion" entailed in strip searches?

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[144] Thus *T.L.O.* takes on secondary importance. This is true regardless of whether strip searches in contexts like *Redding* and *Doe* are deemed the culmination of one progressively more intrusive search or are viewed as a search separate from any prior intrusion. *See supra* notes 40-48. If the strip search is the culmination of one search process, it was "justified at its inception" by the likelihood that some student possessed marijuana at school. *See supra* notes 138-41 and accompanying text. The reasonableness of the strip search would thus be conceptualized in terms of whether the scope of the search became unduly intrusive under *T.L.O.*'s scope principles and *Redding*'s two factors. *See supra* notes 39-43 and accompanying text. If, one on the other hand, the strip search constitutes a separate search, its "justification at its inception" as well as its constitutionality in general would appear to be determined entirely in terms of the *Redding* factors.

[145] *See supra* notes 52-79 and accompanying text.

[146] *See supra* notes 53-55 and accompanying text.

[147] *See supra* notes 7-8, 137. The *Acton* Court described the "deleterious effects of drugs [including marijuana] on motivation, memory, judgment, reaction, coordination, and performance." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 649 (1995). The Court saw deterring drug use in schools as an "important" if not "compelling" educational interest in part because school years are the time when the physical, psychologi-

Although the *Redding* Court found that the threat posed by the pills suspected in that case did not pose sufficient danger to justify the strip search, the Court did suggest that "large amounts" of prescription strength ibuprofen or over-the-counter Advil or Aleve would have sufficed.[148] The quantity of suspected drugs appears relevant for two reasons: overdosing can cause physical harm to the one using the drug and possession of it in large quantities is evidence of intent to distribute it to other students.[149]

On the overdosing issue, large quantities of marijuana may appear to pose less danger than large quantities of Advil or Aleve.[150] On the other hand, the dangers entailed in distribution of marijuana within the school may be greater than those involved with Advil or Aleve.[151] Thus perhaps only the

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cal, and addictive effects of drugs are more severe. *Id.* at 661. Moreover, the effects of "drug-infested" schools "are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted" by students in a "state of rebellion" against rules imposed by the school and, in the case of marijuana, by the criminal law. *Id.* at 662-63. However, Justice Breyer appears to view marijuana use in schools as a less substantial problem than the use of other illegal drugs. In discussing the problem of drugs in school he notes that "about 30% of all students [have used] drugs *other than marijuana* prior to completing high school." Bd. of Educ. v. Earls, 536 U.S. 822, 839 (2002) (Breyer, J., concurring) (emphasis in original).

[148] *See supra* note 30 and accompanying test.

[149] *See* Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2642 (2009).

[150] While poisoning from an overdose of either Advil or Aleve is a distinct possibility, UNIVERSITY OF MARYLAND MEDICAL CENTER, Medical Reference, *Ibuprofen Overdose - Symptoms* http://www.umm.edu/ency/article/002655sym.htm (last visited Dec. 11, 2009), there has apparently never been a documented case of marijuana overdose. WIKI ANSWERS, *Answers - Can you overdose on marijuana if so how* http://wikianswers.com/Q/Can_you_overdose_on_marijuana_if_so_how (last visited Dec. 11, 2009).

[151] Long term health risks of marijuana use are controversial. Some studies claim "that regular heavy use of cannabis carries significant risks for the individual user" ranging from increased likelihood of cancer and schizophrenia to behavioral and physical dependence in seven to ten percent of regular users. Harold Kalant, *Adverse Effects of Cannabis on Health: An Update of the Literature Since 1996*, *available at* http://www.sciencedirect.com (last visited Dec. 11, 2009). Other researchers claim, on the other hand, that evidence of a causal relationship between marijuana use and harmful health effects is lacking, thus rendering cannabis "a relatively safe drug." Leslie Iversen, *Long-term Effects of Exposure to Cannabis*, *available at*

presence of marijuana in significant quantities will pose a danger under *Redding*. If so, how can it be determined whether a danger was present in *Doe*? The dog alert established the possible presence of marijuana but could not indicate its quantity. Thus the school officials in *Doe* had no way of knowing whether the dog was alerting to a baggy full of the substance or to an amount insufficiently copious to roll a single joint.

On the other hand, might the presence of marijuana in school, regardless of its quantity, constitute a *Redding* danger,[152] indeed a more substantial one than the Court's suggested risks posed by significant quantities of Advil and Aleve in the schools? Unlike those over-the-counter drugs, possession of even a small quantity of marijuana is generally a crime exposing youthful possessors to the juvenile, and perhaps the criminal, justice system.[153] As a consequence, school authorities have an interest in protecting their students from the possible negative effects of being labeled a "delinquent" or even worse a "criminal."[154] Such interests exist even where, as in *Doe*, only

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http://www.sciencedirect.com (last visited Dec. 11, 2009). Short-term effects of marijuana use are not in doubt. Consumption of the drug results in increased heart rate, lowered blood pressure, impairment of short-term episodic memory, working memory, psychomotor coordination, and concentration. WIKIPEDIA, *Cannabis*, *available at* http://www.wikipedia.com/wiki/cannabis (last visited Dec. 11, 2009). Such effects could pose health risks to individual students with existing conditions exacerbated by increased heart rate or lowered blood pressure, while causing obvious damage to the educational environment as students are rendered less able to remember what they have learned and to concentrate on their studies. Thus significant numbers of students each with access to marijuana would pose a serious threat to the educational enterprise.

[152] The *Earls* Court recognized an "epidemic" of illegal drug use among students. 536 U.S. at 834. It also rejected a "threshold level" of drug use as a precondition for a drug testing program for school students. *Id.* at 836. In rejecting the idea that only evidence of large quantities of drugs justify school searches, the Court noted: "[W]e refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem.'" *Id.*

[153] *See* National Organization to Reform Marijuana Laws, *available at* http://norml.org/ (last visited Dec. 14, 2009). For a discussion of delinquency jurisdiction in juvenile courts and possible "waiver" to criminal court for minors committing criminal acts, see MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 186-91 (3d ed. 2009).

[154] The Court has recognized that the term "delinquent" has come to involve "only slightly less stigma than the term "criminal." *In re* Gault, 387 U.S. 1, 23-24 (1967). Justice Breyer saw it as a virtue that the school officials in the *Earls* case, like those in

school disciplinary measures flow from discovery of marijuana possession at school. After all, students who possess marijuana at school likely also possess it outside school, thus subjecting themselves to all the possible law enforcement consequences of their criminal acts. Removing marijuana from students' possession at school thus might prevent such out of school consequences.

Because marijuana is criminal contraband, school authorities have additional interests in ridding their schools of its presence. As the Court has recognized, schools "prepare pupils for citizenship in the Republic [and] inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[155] Teaching students to obey society's laws is surely a fundamental aspect of their learning the meaning of good citizenship.

Moreover, the allure of illegal drugs might be especially attractive to students, especially adolescents, as a symptom of their common tendency to rebel against established rules.[156] Given this tendency and the influence of peer pressure, "the single most important factor leading schoolchildren to take drugs,"[157] it is easy to see how even small quantities of marijuana in schools could be deemed a "danger" under *Redding*.

A final factor should be taken into account in assessing the dangerousness of marijuana possession in school. If the substance is deemed non-dangerous under *Redding* that would mean that strip searches for its discovery would be unconstitutional under the conjunctive version of the *Redding* standard and more likely to be forbidden under the disjunctive version. Such consequences may provide incentives to students to bring

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Doe, chose to deal with their drug problem in a manner that avoided criminal or juvenile court sanctions. *Earls*, 536 U.S. at 838 (Breyer, J., concurring).

[155] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[156] *See supra* note 147. As a group, adolescents are generally more likely to engage in risky behavior, including criminal conduct, than adults. *See* Elizabeth S. Scott et al., *Adolescent Decisionmaking in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995).

[157] *Earls*, 536 U.S. at 840 (Breyer, J., concurring).

marijuana to school and hide it in their underwear thus avoiding its possible discovery.[158]

All of this illustrates the uncertainty of whether the threat of marijuana in *Doe* posed a danger under the available standards provided by the Court. Even if the Court offers further guidance, the danger assessment, except in a few obvious situations, is a normative matter, a straightforward policy judgment, not subject to objective determination.[159]

b. The In the Underwear Factor

The second factor of the *Redding* standard, the concern that school officials have reason to believe that a student is carrying evidence of wrongdoing in her underwear, is irrelevant if *Redding* embraces a disjunctive standard and the danger factor is satisfied through the reasonable belief of school officials that a student possesses dangerous contraband with no particular understanding that it might be hidden under their clothing. In such a situation, and assuming that the Court continues its reluctance to require exhaustion of less drastic alternatives,[160] it would apparently be constitutional to directly strip search the student even with no particular reason to believe he had anything hidden in his underwear just in case the dangerous item was so hidden.

Because it is uncertain whether the *Redding* standard is disjunctive or conjunctive and equally uncertain whether the threat of marijuana in *Doe* constituted a *Redding* danger, it is necessary to assess the second, the in the underwear factor, in order to determine the constitutionality of the strip search in *Doe*. As with the danger factor, however, the *Redding* Court offers virtually no guidance as to how this assessment should proceed.

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[158] *See infra* notes 182-84 (discussing similar considerations in the context of possession of stolen money).

[159] This is not to say that the notion of "danger" is impossible to define more narrowly. For example, the Court could limit the term to the risk of serious physical harm or bodily injury as opposed to the open-ended dictionary definition of "exposure to possible evil, injury, or harm." WEBSTER'S II: NEW COLLEGE DICTIONARY (2001). Moreover, the Court could clarify whether its danger inquiry is limited to risk of harm to students or also extends to protecting the general educational environment. *See supra* note 56 and accompanying text.

[160] *See supra* notes 87-94 and accompanying text.

In *Doe*, the school officials suspected that the student was hiding marijuana under her clothing as evidenced by the dog's alert and the failure to discover contraband through the prior search of Doe's clothing. Would this evidence provide sufficient reason to believe Doe had hidden marijuana under her clothing under *Redding*'s second factor or would the Court require more specific evidence along the lines of a witness informing school officials that she saw Doe put marijuana under her clothing? Even if the dog sniff evidence is considered indirect, as a general Fourth Amendment matter direct evidence is not required to establish reasonable suspicion or even probable cause to conduct non-strip searches.[161] Given the Court's recognition that strip searches are often experienced as particularly humiliating to young people,[162] it is possible that a more rigorous evidentiary standard might be in order as justification for student strip searches.

Assuming that ordinary Fourth Amendment evidentiary standards are in place, it would appear that the dog sniff provided the school officials good reason to believe Doe had hidden marijuana beneath her clothing, thus seemingly satisfying the second prong of the *Redding* standard. If so, and assuming that even if marijuana does not constitute a danger under a disjunctive standard, it would appear that the strip search of Doe was constitutional contrary to the *Doe* court's finding.

This conclusion might be further supported by the fact that even though the police were involved, the search in *Doe* was not conducted for law enforcement purposes but only to rid the schools of drugs and visit school discipline upon offending students. *Dicta* in *T.L.O.* suggests that Fourth Amendment rigor might be further relaxed for school administrative searches but more rigorously imposed when school searches are conducted by the police or perhaps by school officials with law enforcement consequences in mind.[163] This consideration may translate to the strip search context by allowing school authorities greater leeway, giving them more "reason," to conduct strip searches where the consequences of such to the student are merely school discipline rather than juvenile or criminal court sanction.

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[161] "[T]he probable cause standard does not require the police to have direct, physical evidence . . . ." Gibson v. State, 758 So. 2d 782, 790 (La. 2000). Thus, for example, hearsay evidence is sometimes sufficient to establish probable cause, Jones v. United States, 362 U.S. 257, 271 (1960), even hearsay-upon-hearsay, *see, e.g.*, United States v. Mathis, 357 F.3d 1200, 1204 (10th Cir. 2004) ("[M]ultiple layers of hearsay may support a finding of probable cause for a search warrant.").

[162] *See supra* note 29 and accompanying text.

3. Summary

All of this illustrates that the Supreme Court case law post-*Doe* provides little analytical assistance in resolving the questions posed by the case.[164] We are thus left with the following: assuming that the dog sniff was not itself a "search," or if it was, not an "unreasonable" one (a good assumption); if *Redding* espouses a disjunctive standard (maybe it does, maybe it doesn't), the search was constitutional if marijuana constitutes a *Redding* danger (unclear) *or* if the dog sniff provided reason to believe Doe had hidden contraband under her clothing (probably good reason). If *Redding* espouses a conjunctive standard (maybe it does, maybe it doesn't), marijuana must pose a *Redding* danger *and* the dog must have provided sufficient reason to believe Doe had hidden contraband under her clothing. In light of such uncertainty, the most that can be said is that the *Doe* court's conclusion that the strip search was unconstitutional may be erroneous.

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[163] Citing lower court case law requiring probable cause rather than reasonable suspicion as required for school searches involving the police, the *T.L.O.* Court stated:

> We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.

New Jersey v. T.L.O., 469 U.S. 325, 342 n.7 (1985). Two concerns seem to be in play here. Searches conducted by the police rather than by school officials may be thought to be inherently more intrusive to the student thus perhaps necessitating a higher level of justification for the search. The other consideration appears to be that in light of the fact that searches conducted for law enforcement purposes often result in more severe consequences to the student than those conducted for school administrative purposes, a higher level of justification again might be required. At least one court upholding a strip search of a student on suspicion of marijuana possession found it relevant that the search was "conducted by school officials with no law enforcement officials present." Rone *ex rel.* Payne v. Daviess Cnty. Bd. of Educ., 655 S.W.2d 28, 30 (Ky. Ct. App. 1983) (suggesting that the search might be less constitutionally acceptable had it been for law enforcement purposes).

[164] Whether the above analysis of *Doe* is complete without relating *T.L.O.*'s age and sex of the student considerations is unclear. *See supra* note 129. Doe was a female of junior high age. *See supra* notes 106-13 and accompanying text.

B. Galford v. Anthony[165]*: Stealing Your Teacher's Money*

Galford is a post *T.L.O.* case which involved a strip search of a student suspected of stealing money from a teacher's purse during school hours. After the teacher reported that $100 was missing from her purse which she had placed under her desk during a period when her classroom was empty, school officials focused their suspicion upon a fourteen-year-old student, Mark, who was known both to be on probation for attempted burglary and likely to have been alone in the classroom during the time it was empty. Acting on this evidence, the school social worker confronted Mark who admitted being alone in the classroom but denied taking the money. After examining Mark's pockets and looking in his socks, the social worker informed the school principle that he had found nothing and that if Mark possessed the money it must be hidden in his underwear. The principal then took Mark into the boy's bathroom, looked in his pockets and socks and, again finding nothing, asked Mark to lower his pants and pull his underwear open in the front and back. Mark's compliance with these requests revealed the missing $100 hidden in the back of his underwear. Mark confessed to stealing the money which was returned to the teacher who initiated criminal proceedings against Mark, resulting eventually in his adjudication as a delinquent.

Mark moved to suppress the evidence as the product of a violation of his Fourth Amendment rights. The court agreed, finding that while the searches of Mark's pockets and socks were reasonable under *T.L.O.*'s "justified at its inception" prong, the subsequent strip search exceeded the second, "reasonable in its scope," prong and was thus unconstitutional.[166] The court presumed the strip search to be "excessively intrusive" and per se unconstitutional in the absence of "exigent circumstances" posing "immediate danger" to the "safety of other students."[167] Mark's suspected theft of the money did "not begin to approach" the level of threat to other students necessary to sustain the strip search.[168]

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[165] 433 S.E.2d 41 (1993).

A colorful dissenting opinion allowed that it would be unreasonable to strip search a student suspected of "stealing an elephant" but totally reasonable to do so for one suspected of stealing money, given that "nine out of ten experienced thieves believe that the best place to *hide* something is where it is unlikely to be discovered."[169] Thus "where else would a guilty child hide $100 [but in his underwear]?"[170] In the dissenter's view "[i]f any search is justified, then a search reasonably calculated to discover *hidden* contraband is justified."[171] Failure to permit the search risked the school's ability to protect the "morals" of the student and "to maintain the proper functioning of the school."[172] Such a failure led the dissenter to conclude "[i]f we wonder why our schools are going to hell in a handbasket, it's probably because of decisions like [the majority's]."[173]

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[166] *Id.* at 45, 49. The court focused on the unique intrusiveness of strip searches:

> At some point, a line must be drawn which imposes limits upon how intrusive a student search can be. We certainly cannot imagine ever condoning a search that is any more physically intrusive than the one now before us. Looking inside of a student's underwear is an invasion of personal privacy that should not be equated with searching a student's locker or other personal possessions.

Id. at 48.

[167] *Id.* at 49.

[168] *Id.*

[169] *Id.* (Neely, J., dissenting).

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

1. *Redding* and *T.L.O.*

The *Galford* court treats the multiple searches conducted by the principal as essentially a single search process beginning with the search of Mark's pockets and socks and culminating in the strip search. The court then assesses the search in terms of the two-prong *T.L.O.* standard finding it justified at its inception but excessive in its scope as it progressed to the strip search. This view of the search as a single process with attention directed to its reasonableness at its inception and to its intrusiveness in its eventual scope may well be the approach taken by the *Redding* Court[174] with the addition of its two-factor standard as an aid in determining the search's constitutionality under the scope issue.[175] In any event, as with the *Doe* case, *Redding* provides little guidance in determining the legality of the strip search in *Galford.*

2. *Redding*'s Two Factor Standard

As in the analysis of the *Doe* strip search, the same problems with the conjunctive/disjunctive ambiguity of the *Redding* standard are obviously present in rethinking *Galford.* The facts of *Galford* provide evidence supporting both prongs of the *Redding* standard without clearly establishing either, again rendering *Redding* of little utility under either the conjunctive or disjunctive standard.

a. The Danger Factor

Without access to the *Redding* opinion, the *Galford* court nevertheless focused on danger considerations in finding that the constitutionality of a student strip search hinged on a showing that such search was necessary to protect "the safety of [students] other" than the one being searched.[176] Under this view, the *Galford* court was correct in concluding that no danger was present in the case.

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[174] *See supra* notes 40-43 and accompanying text.

[175] *See supra* notes 40-43 and accompanying text.

[176] *See supra* note 167 and accompanying text.

However, it is not clear that a post-*Redding* analysis would necessarily yield the same conclusion. Arguably the *Galford* court's conceptualization of danger is narrower than that articulated under *Redding*'s concern with avoiding "danger to students."[177] This language suggests a broader interest in protecting all students, including the one being searched, from danger. If, for example, a particular student was thought to possess a substance deadly only to himself because of his unique allergies, it is difficult to see how this could not constitute a danger under *Redding* if there existed reason to believe the student was about to ingest the substance.

Moreover, it is unclear whether *Redding*'s concern with avoiding "danger to students" is limited to risks of physical harm or whether it is broad enough also to cover "dangers" to their emotional well-being or to general educational interests of students and the school at large.[178] *Acton* and *Earls* permitted wholesale drug searches in part to protect against the danger of disruption of the educational process.[179] Even though strip searches are "categorically distinct invasions," there is no reason to distinguish the educational interest in *Acton* and *Earls* from those in *Redding* by necessarily ruling out protection of the educational environment as a "danger to students."

Therefore, the question in *Galford* may be recharacterized in terms of whether the stolen money thought to be possessed by Mark constituted a "danger" to him or to the educational environment of the school in general. If so, the situation in *Galford* may well have been considerably more dangerous than that identified by the court.

Whether there existed a *Redding* danger to Mark himself by his possession of the stolen money depends on how one looks at the situation. While certainly risking no physical harm to himself, the facts of *Galford* make clear that possession of the contraband clearly endangered his ability to continue his education at his school as well as to put him at risk of significant legal consequences. So viewed, the money in his pocket constituted a danger to his individual interests in receiving an education and remaining free from the restraints of liberty entailed in legal sanctions for theft. Of course, in *Galford* the search itself *resulted* in those dangers being visited upon Mark. In other contexts, however, a strip search revealing money stolen from a teacher might have the effect of protecting the student from such dangers if the student "is given another chance," and as a consequence of the search is deterred from committing additional offenses which would have resulted in his being suspended from school and subjected to legal sanctions. This manifestation of "specific deterrence"[180] is consistent with the school's interest in protecting its students from engaging in criminal conduct[181] as well as its interest in teaching its students civility.[182]

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[177] *See supra* text accompanying note 4.

[178] *See supra* note 56.

[179] *See supra* note 147.

Possession of stolen money by a student thief can be viewed as a "danger" not only to the particular student but also to the school at large. If hiding contraband under one's clothing insulates student thieves from strip searches, thefts at school might increase as students succumb to temptations to steal with the knowledge that they need only hide their ill-gotten gains in their underwear thus avoiding possible detection.[183] If, on the other hand, strip searches to recover stolen property are permitted to address the "danger" of school theft, the effect may be to "generally deter"[184] theft-prone students.

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[180] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (4th ed. 2006) (specific deterrence occurs when one is dissuaded from future misconduct by having unpleasantness visited upon him for his past misconduct).

[181] *See supra* note 154 and accompanying text.

[182] *See supra* note 155 and accompanying text. Certainly a student stealing money from a teacher raises a serious moral and legal problem going to the heart of the school's mission in teaching civility to its students.

[183] Under the conjunctive version of the *Redding* two-factor standard, hiding non-dangerous contraband in one's underwear would absolutely insulate the offending student from a strip search. Under the disjunctive version, the student might still be stripped searched if sufficient reason existed to believe he had hidden the non-dangerous contraband in his underwear.

[184] *See* DRESSLER, *supra* note 180 (general deterrence occurs when the general community is dissuaded from engaging in misconduct because of fear of having the same unpleasantness visited upon them that they see visited upon those engaging in the misconduct).

Finally, the *Galford* court was probably correct in concluding that the situation in the case posed no "exigent circumstances" posing "immediate danger" to the students in Mark's school. *Redding* however, makes no mention of a requirement that the danger be "immediate." The "dangers" justifying the searches in *T.L.O.*, and *Earls* posed no "immediate" threats to educational interests.[185] As far as "exigent circumstances" are concerned, they were arguably present in *Galford* in any event. The principal knew that the money had been stolen on the day he searched Mark and that Mark had been in school the entire day. If the principal had delayed his search until a time that allowed Mark to leave school premises, he would likely have removed the money from his underwear and not have continued to carry it on his person. If possession of the money constituted a danger, exigent circumstances justified an immediate search.

As with the marijuana issue in *Doe*, it is clear that a host of educational policy issues are at stake in determining whether possession of stolen money constitutes a danger under *Redding*. As such, reasonable minds will surely differ on the issue. Without further guidance from the Supreme Court, we are left with the situation reflected by the *Galford* court with the majority seeing the theft by Mark as "not even beginning to approach" a danger sufficient to justify a strip search[186] and the dissent accusing the majority of contributing to the educational

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Outside the strip search context the Court has allowed school officials to search students in order to deter a potential school problem which might occur in the future. In *Earls*, some evidence of occasional drug use existed but there was no evidence of a massive problem. Nevertheless the Court permitted urinalysis tests of a large portion of the student body. See the *Earls* quote, *infra* note 185.

[185] *T.L.O.* involved a student smoking in the school restroom and *Earls* involved a potential threat of a future drug problem. *See supra* notes 8-9. The *Earls* Court specifically rejected a requirement that the drug threat be immediate.

> [T]he need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

Bd. of Educ. v. Earls, 536 U.S. 822, 836 (2002).

[186] *See supra* text accompanying note 168.

system's "going to hell in a handbasket" through its blindness to the obvious danger posed by Mark's possession of the stolen money.[187]

b. The In the Underwear Factor

Unlike the situation in *Doe*, school authorities had individualized suspicion of Mark from the inception of the search process. The evidence supporting the strip search was less direct than that in *Doe*, however, being inferred from the belief that Mark may have stolen the money and hidden it in his underwear when the search of his pockets and socks yielded nothing, rather than based on a dog or a witness directly identifying him as possessing contraband. Again, the fact that no direct evidence suggested that Mark had hidden the money in his underwear does not necessarily render unreasonable the suspicion that he had so hidden it.[188] That the strip search in *Galford*, unlike the one in *Doe*, in fact revealed the suspected contraband is, of course, irrelevant in determining whether the search was founded on reasonable belief that the money was hidden in Mark's underwear.[189]

The principal conducted the strip search based on his knowledge that Mark had been alone in the classroom and thus had the opportunity to steal the money. Apparently the principal did not engage in an extensive investigation to discover whether any other person might also have had a similar opportunity.[190] Surely it would have been more reasonable to believe Mark had stolen the money if it were known that he had been the only student with the opportunity to steal the money.

Such failure to investigate the possibility that someone else might have stolen the money is perhaps excused because of the principal's knowledge of Mark's past troubles with the law.

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[187] *See supra* text accompanying note 173.

[188] *See supra* note 161 and accompanying text.

[189] "It is axiomatic that hindsight may not be employed in determining whether a prior . . . search was [constitutional]." WAYNE R. LAFAVE, 2 SEARCH AND SEIZURE 47 (4th ed. 2004).

[190] It is not clear from the facts whether such an investigation would have been practical under the circumstances.

Courts routinely take into account character assessments of particular students searched by school officials in determining whether such searches are reasonable.[191]

Finally, of possible relevance to the reasonableness of the strip search of Mark is the fact that the fruits of the search were used in evidence against him in juvenile court proceedings. As noted in the discussion of *Doe*, there is reason to believe that the Supreme Court might more rigorously scrutinize strip searches conducted for law enforcement purposes rather than those engaged in solely as matters of educational administration.[192] While the police were not involved in Mark's strip search, the purpose of the search was to discover the fruits of a crime which provided the basis for the teacher's initiation of delinquency proceedings. The search thus could easily be viewed as one initiated by school officials but conducted to a significant extent for law enforcement purposes.

3. Summary

As with the *Doe* case, existing case law is inadequate to assist with any degree of assurance a determination of the constitutionality of the strip search in *Galford*. Uncertainties about whether possession of stolen money constitutes a *Redding* danger and whether sufficient evidence existed to afford reason to believe Mark had hidden the money in his underwear make it impossible to confidently reach a conclusion under a disjunctive *Redding* standard much less a conjunctive one. Again, as with *Doe*, the most that can be said is that the *Galford* court's conclusion that the strip search was unconstitutional appears questionable.

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[191] *See, e.g.*, the Ninth Circuit en banc opinion in *Redding* where the court noted that Redding was an "honor student" deeming the factor relevant in concluding that the school officials lacked sufficient reason to strip search her. Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071, 1074 (9th Cir. 2008) (en banc).

[192] *See supra* note 163 and accompanying text. It must be noted, however, that the evidence obtained in the search of the student in *T.L.O.* was utilized in proceedings adjudicating her a delinquent resulting in her being placed on probation for one year. New Jersey v. T.L.O., 469 U.S. 325, 329-30 (1985). The *T.L.O.* Court made no mention of the consequences of the search in reaching its conclusion.

C. Fewless v. Board of Education of Wayland Union Schools[193]*: Ulterior Motives and Accusations of Pot in "Butt Cracks"*

Fewless involved the strip search of a fourteen-year-old student, Joseph, who had a history of lying and being the subject of school disciplinary procedures.[194] The search was precipitated by information provided to the assistant principal, Mr. Cutler, by two students, Terpstra and Letting, who had bullied Joseph in the past. The students informed Cutler, who was aware of the students' animosity towards Joseph, that he had told them that he was at that moment hiding marijuana in his "butt crack."[195] A shop teacher made a similar report[196] to Cutler pursuant to the teacher's receipt of information from some other students, probably the same ones informing Cutler earlier. After sharing the information with the school security officer, Cutler brought Joseph to Cutler's office where Joseph denied that he was hiding anything under his clothing. Cutler and the security officer then informed Joseph that any search beneath his clothing must be with his consent and Joseph stated that he had nothing to hide. Joseph then lowered his pants pursuant to Cutler's order and the security guard pulled back the waistband of Joseph's boxer shorts and observed his bare buttocks. Finding nothing, the two officials then allowed Joseph to go back to class.

The strip search was the culmination of a series of events beginning earlier in the day. Prior to the report of Terpstra and Letting to Cutler, Terpstra and three others, again all with a history of animosity towards Joseph, had informed Cutler that Joseph had told them that he possessed marijuana.[197] Cutler then confronted Joseph and searched his gym bag and pockets.[198] Finding no marijuana, Cutler sent Joseph back to class and informed Terpstra and another student that no marijuana had been found on Joseph. Subsequently, Terpstra and Letting made their report to Cutler informing him that Joseph had told them that the fruitless searches of his gym bag and pockets did not mean that he did not possess marijuana, but rather that he had evaded detection by hiding the substance in his "butt crack."[199]

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[193] 208 F. Supp. 2d 806 (W.D. Mich. 2002).

[194] *Id.* at 812. Joseph was diagnosed with ADHD which contributed to impulsive behavior such as leaving his seat during class and talking out of turn. However, Joseph had no history of being disciplined at school for drug violations. *Id.*

[195] *Id.* at 810.

[196] The teacher reported that students had told him that Joseph had drugs down "the crack of his ass." *Id.*

[197] The students claimed Joseph had told them that he possessed marijuana in a dime roll which several of the students claimed to have seen. *Id.* at 809.

Joseph subsequently brought an action claiming that the strip search violated his Fourth Amendment rights.[200] The court agreed, finding that Joseph had not consented to the search[201] and that the strip search failed both prongs of the *T.L.O.* standard, being neither justified at its inception nor reasonable in its scope.[202]

The court clearly identified the strip search as a separate Fourth Amendment intrusion from the searches of Joseph's gym bag and pockets,[203] intrusions apparently justified both at their inception and reasonable in their scope.[204] While the adequacy of the tips from students harboring animus towards Joseph were not questioned as providing an inadequate basis for supplying reasonable suspicion for the search of the gym bag and pockets, such tips were found wanting as grounds for the strip search. The court concluded that even though Terpstra and Letting were known informants, the situation was analogous to one involving an anonymous tip because their long standing animosity towards Joseph supplied them with "clearly possible ulterior motives" for informing on Joseph.[205] These motives were known to Cutler and should have given him pause in relying on the truthfulness of the tip without further corroboration. The court faulted Cutler for not conducting "an investigation" to determine whether other students harboring no ill will towards Joseph might have corroborated the statements of Terpstra and Letting, or have otherwise provided statements or information helpful to determining whether reasonable suspicion existed to support a strip search.[206] Furthermore, the court was critical of Cutler for failing to call Joseph's parents who might have provided additional information regarding whether further investigation was warranted,[207] for failing to question Joseph beyond confronting him with the "butt crack" accusation, and for failing to exhaust less drastic alternatives such as searching his locker or "other locations . . . which may have led a reasonable person to believe the accusations" before resorting to the strip search.[208] While such failures spoke to the lack of justification for the strip search at its inception, the court also found the search unreasonably intrusive in its scope, given the fact that rather than pulling out the waistband of the student's underwear and peering inside as was done to Joseph, there existed the less drastic alternative of asking the student "to shake his . . . underwear, while not exposing [himself], to see if any contraband were to come loose and become visible beneath the underwear."[209] Moreover, the court suggested that the strip search was further unreasonable because the search as conducted was unlikely to discover marijuana "placed deeply between the buttocks" and was thus pointless.[210] Therefore, the combination of questionable credibility of the informants because of their potential ill motives, the lack of other corroborating evidence, and failure to exhaust less drastic alternatives rendered the "highly invasive and humiliating search"[211] unconstitutional.

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[198] Cutler also searched a dime roll in Joseph's possession and found no contraband. *See supra* note 197.

[199] 208 F. Supp. 2d at 810.

[200] Joseph made no claim that the search of his gym bag and pockets was illegal. *Id.*

[201] In an extensive discussion, the court found that Joseph had merely "acquiesc[ed]" in the search but had not freely and voluntarily "consented." *Id.* at 813-15.

[202] *Id.* at 815-16.

[203] "[T]wo searches of Joseph . . . occurred . . . ." *Id.* at 809.

[204] Because the search of the gym bag and pockets was not contested, *see supra* note 200, Joseph may well have conceded its constitutionality. Without addressing its constitutionality, the *Fewless* court simply stated that "the legality of this search is not at issue." 208 F. Supp. 2d at 810.

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[205] 208 F. Supp. 2d at 816. The court saw the accusation by the students as "exactly an accusation of the type which might be expected to potentially result in a highly invasive and humiliating search" of Joseph. *Id.* at 819.

[206] *Id.* at 817.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 820.

[210] *Id.*

1. *Redding* and *T.L.O.*

Assuming that *T.L.O.* supplements *Redding* in informing constitutional analysis of strip searches,[212] the two-factor inception and scope standard must be satisfied for searches to be constitutional. The *Fewless* court saw two analytically distinct searches in that case, the permissible search of Joseph's gym bag and pockets and the unjustified at its inception and unreasonable in its scope strip search. While *Fewless* saw two searches, the situation could just as easily be viewed as a single search beginning with the gym bag/pockets and, after a brief interlude, progressing to the strip search.[213] As a practical matter it makes little difference whether *Fewless* is a one or two search situation because in either case if search activity fails either prong of *T.L.O.* any subsequent search causally connected to the tainted activity would necessarily be unconstitutional.[214]

The *Fewless* court provided no explanation for why tips from informants with ulterior motives were inherently suspicious so as to render the strip search unjustified at its inception but were apparently sufficiently reliable to justify the search of the gym bag and pockets at its inception.[215] The court did describe strip searches as "highly invasive and humiliating," thus seemingly embracing something like the *Redding* view that such searches are "categorically distinct" requiring heightened justification.[216] In finding no such justification, the *Fewless* court focused entirely on the inadequacy of suspicion to believe that Joseph had marijuana hidden beneath his clothing (the second *Redding* factor) and made no mention of the possible danger posed by marijuana (the first *Redding* factor). Analyzing *Fewless* in light of *Redding* requires, of course, attention to both *Redding* factors.

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[211] *Id.* at 819.

[212] *See supra* notes 129-30 and accompanying text.

[213] *See supra* notes 173-75 and accompanying text (discussing *Galford's* single search conceptualization).

[214] *See supra* notes 130-32 and accompanying text.

[215] Again, the constitutionality of the first search was not at issue in *Fewless.* I am presuming that the court may have found it constitutional had the issue been decided. *See supra* notes 200, 204 and accompanying text.

[216] *See supra* note 27 and accompanying text.

2. The Danger Factor

The contraband at issue in *Fewless* was marijuana. The earlier discussion of the *Doe* case argues that the threat of marijuana in schools may constitute a *Redding* danger,[217] and if it does, the strip search in *Fewless* would be constitutional under the disjunctive version of the *Redding* standard[218] regardless of whether Cutler had sufficient reason to search beneath Joseph's clothing. Of course even if a danger existed in *Fewless*, the strip search would still be unconstitutional under *Redding*'s conjunctive standard[219] if Cutler lacked sufficient reason to search beneath Joseph's clothing.

3. The In the Underwear Factor

As in *Galford*, but unlike the initial intrusion in *Doe*, school officials in *Fewless* possessed individualized suspicion of Joseph as a violator of a school rule. Moreover, unlike the other two cases where suspicion of evidence hidden beneath clothing was inferred through a process of fruitless less intrusive searches, the suspicion triggering the strip search of Joseph was grounded on evidence specifically indicating that he had hidden contraband beneath his clothing. Such evidence does not, of course, necessarily mean that the strip search in *Fewless* was inherently more reasonable than the ones in *Doe* and *Galford* where the suspicion of evidence hidden beneath the clothing was arrived at through an inferential process. The reasonableness of the searches in all three cases must be determined in terms of the reliability of the evidence, whether it be inferred or specific.

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[217] *See supra* notes 147-58 and accompanying text.

[218] *See supra* note 35 and accompanying text.

[219] *See supra* notes 34-35 and accompanying text.

The reliability of the evidence in *Fewless* depends on whether the evidence provided by the two student informants constituted credible, believable, information. The *Fewless* court recognized that an informant's tip could create reasonable suspicion in some cases if considering the "totality-of-the-circumstances" the tip's "quantity and quality" is sufficiently credible.[220] Such a standard appears at home with *Redding*'s concern that there be reason to believe that a student has hidden evidence in his underwear as a factor in determining the legality of the actions of school officials who conduct strip searches. As noted, *Redding* offers no guidance in determining what reasonable belief would look like, thus leaving courts with broad discretion to make *ad hoc* judgments. That such judgments are often controversial is illustrated by a close examination of whether the evidence in *Fewless* provided a reliable basis to believe that Joseph had hidden marijuana beneath his clothing.

While the conclusion of the judge in *Fewless* is understandable, it is hardly the only one permitted under the facts. In fact, an argument can be made that under existing law at the time of *Fewless* the tip from the student informants not only provided reasonable suspicion that Joseph had marijuana hidden under his clothing but probable cause to believe that he did.[221]

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[220] Fewless *ex rel.* Fewless v. Bd. of Educ., 208 F. Supp. 2d 806, 818 (W.D. Mich. 2002).

[221] While the law defining probable cause, like that of reasonable suspicion, is notoriously vague, the Supreme Court has provided a modicum of guidance in deciding whether information from informants constitutes probable cause. To begin with, it is helpful to distinguish between "citizen-informers," average citizens who by happenstance find themselves in the position of a witness to illegal activity, and "informant[s]," persons who routinely supply the police with information. *See* WAYNE R. LAFAVE, 2 SEARCH AND SEIZURE 98 (4th ed. 2004). Information from citizen-informers is deemed inherently more reliable than that of informers. *Id.* In the *Fewless* context, Terpstra and Letting would appear to be "citizen-informers" notwithstanding their animosity towards Joseph, thus entitling their information to a presumption of reliability perhaps approaching probable cause. *Id.*

But even if Terpstra and Letting are characterized as non-citizen informants, their information may well have constituted probable cause under Supreme Court case law. In *Aguilar v. Texas*, 378 U.S. 108 (1964), the Court fashioned a two-prong test in determining whether information provided by informants known to the police but ano-

Whatever the probable cause determination in *Fewless*,[222] reasonable suspicion to strip search appears to have existed. The court's conclusion that the students' tip was inherently suspect because of their animosity towards Joseph is surely questionable. It is often the case that an informant's animosity towards an alleged offender provides *more*, not less, reason to believe in the reliability of the information.[223] Terpstra and Letting could easily be viewed not as "anonymous" informants as the court chose to designate them,[224] but students who

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nymous to the magistrate constituted probable cause to issue a warrant. The first prong requires that facts exist showing that the informant has a basis for knowing the truthfulness of his allegation, while the second prong requires that facts exist showing either the inherent credibility of the informant or the reliability of his information on the particular instance at issue. LAFAVE, *supra* this note. The "basis of knowledge" prong is satisfied if the informant himself has perceived the fact asserted. Spinelli v. United States, 393 U.S. 410, 425 (1969) (White, J., concurring). The second prong of the test is established either by showing the credibility of the informant in providing truthful information in the past or by showing that the informant is making a declaration against his interest. LAFAVE, *supra* this note, at 100-01. Terpstra and Letting's information clearly appears to satisfy the first prong since they both claim to have heard the fact asserted, namely that Joseph stated that he had marijuana hidden beneath his clothing. The second prong of the test is arguably satisfied because their statement is against their interests in that, if false, it could subject them to disciplinary action for falsely accusing a fellow student. The second prong could also be satisfied if, not knowable from the facts of *Fewless*, the students had provided truthful information in the past.

Finally, the fact that Terpstra and Letting's statement is hearsay insofar as the truth of the matter asserted (whether Joseph had marijuana hidden beneath his clothing) does not negate the possibility of probable cause. The *Aguilar* Court specifically noted that affidavits meeting its two-prong test are routinely based on hearsay. 378 U.S. at 114.

[222] In criticizing the need for a relaxed reasonable suspicion standard for school searches, Professor LaFave has argued the standard is unnecessary because the school cases reaching the courts "strongly suggest that in most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test. In the great majority of cases, the searches were conducted on the basis of information received from other students." WAYNE R. LAFAVE, 5 SEARCH AND SEIZURE 495 (4th ed. 2004).

[223] *See, e.g.*, Massachusetts v. Upton 466 U.S. 727, 733-34 (1984) (viewing the informant's desire "to burn" her former boyfriend as a motive lending credibility to her accusations against him); State v. Martinez, 432 So. 2d 1201, 1203 (La. Ct. App. 1983) ("The suggestion of the informant's vengeful motives does not defeat her credibility . . . .").

[224] This assessment by the court appears to be an after the fact judgment much like the one made by the *Doe* court. *See supra* notes 124-27 and accompanying text. When

risked sanction for providing false information in a face to face meeting with a school official. Moreover, the reliability of their information need not be called into serious question by Joseph's subsequent denial of drug possession given his reputation for lying. Of course his reputation for lying might also call into question his alleged statement to Terpstra and Letting. In any event, it was far from clear that Cutler was obligated to spend time, if any was in fact available, seeking corroboration of the tip before strip searching Joseph.[225]

Finally, the requirement that Cutler should have exhausted less drastic alternatives prior to strip searching Joseph is at odds with the Court's general reluctance to impose such a requirement.[226] Given the silence of the *Redding* Court on the issue, there is no reason to believe that such requirement exists as a precondition to valid strip searches.

3. Summary

None of this is to say that the *Fewless* court was clearly wrong in finding an absence of reasonable suspicion to support the strip search. The point of the discussion is simply to illustrate that, as in *Doe* and *Galford*, clear answers are unavailable even after *Redding*. Uncertainties about whether marijuana possession constitutes a *Redding* danger and whether the student informants provided sufficient evidence to believe Joseph had hidden marijuana under his clothing make it impossible to reach a clear conclusion under either a disjunctive or conjunctive *Redding* standard. Again, as with *Doe* and *Galford*, the most that can be said is that the *Fewless* court might have reached an erroneous conclusion.

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no marijuana was found on Joseph, it is much easier to attribute motives to Terpstra and Letting to harass an innocent Joseph rather than to cause a guilty one to experience the unpleasantness entailed in being caught possessing marijuana.

[225] It is not clear from the facts of *Fewless* whether Cutler would have had time to corroborate the tip on the day it was received. Corroboration on any subsequent day would risk removal of the marijuana, had it been present on Joseph's person.

[226] *See supra* notes 87-94 and accompanying text.

IV. *REDDING'S* FUTURE

In separate opinions, two *Redding* Justices offered strikingly different appraisals of the significance of the case. Justice Stevens downplayed the case suggesting that it "leaves the boundaries of the law undisturbed," charts "no new constitutional path," and does little more than decide whether the strip search at issue in the case was constitutional "on these facts."[227] On the other hand, Justice Thomas saw *Redding*, with its invitation to courts to make danger assessments in determining the constitutionality of strip searches, as a case empowering judges to be the arbiters of delicate matters of educational policy.[228] If one of these views ultimately prevails, *Redding* will either be a decision so narrow as to be of little utility in deciding future cases or one so broad as to require judges to replace educational policymakers as the determiners of what constitutes a danger to the educational process. Either way, *Redding* is unlikely to provide an acceptable objective framework to assist courts in deciding the types of cases they will be called upon to consider in the future.

Justice Stevens' view is surely too narrow. *Redding* will certainly prove to be more than a case merely deciding the constitutional consequences of those particular facts. The Court provided its two-factor standard as the means for determining the constitutionality of student strip searches. The standard does entail a new approach, with the two factors involving significantly different kinds of inquiries. Requiring courts to assure that sufficient reason to believe that a student has contraband hidden under her clothing before school officials strip search her is, to a large degree, a factual matter examining whether sufficient evidence supports the belief. It is the kind of inquiry familiar to the judiciary, well within its competency to decide,[229] and relatively free from value assessments involving educational policy. On the other hand, inviting independent judicial assessments of the reasonableness of school officials' fear of danger to their students, or to the educational environment at large, introduces a much broader inquiry into matters of educational policy than was permitted under the Court's previous student search cases.[230] Thus Justice Thomas's concern with *Redding*'s blessing to judicial danger assessments appears well-founded.[231]

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[227] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2645 (Stevens, J., concurring in part and dissenting in part.).

[228] *Id.* at 2646 (Thomas, J., concurring in part and dissenting in part).

[229] The inquiry is in many ways similar to the probable cause to search decisions routinely made by courts in which they decide whether the "facts and circumstances in a given situation are sufficient to warrant a person of reasonable caution to believe

Determining "danger" in the educational context is often a value laden, educational policy, inquiry as the discussion of *Doe* and *Galford* makes clear.[232] Courts are ill-suited, indeed incapable, arbiters of educational policy as the Court itself has explicitly indicated and indirectly acknowledged through its refusal in recent cases to interfere with the discretion of educators when challenged by constitutional claims of students.[233]

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that seizable objects are located at the place to be searched." CHARLES H. WHITEHEAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 162 (5th ed. 2008). The inquiry is thus "objective" and "not dependent upon the subjective view of the . . . authorizing magistrate." *Id.*

[230] *See supra* notes 15, 43-48 (discussing the "nature of the infraction" consideration under *T.L.O.*'s reasonable scope prong). *See generally*, James and Larson, *supra* note 2, at 23 (arguing that the Court had allowed in its pre-*Redding* cases such broad deference to educators in conducting school searches that their actions are constitutional so long as they are performed in the "good faith" attempt to further their educational mission).

[231] *See supra* notes 56-69 and accompanying text. It should be noted, however, that such assessments may not be necessary in all post-*Redding* strip search cases. If the conjunctive version of the *Redding* standard is eventually settled on, some cases might be decided by finding searches unconstitutional for want of adequate reason to search beneath students' underwear without ever reaching the danger factor. On the other hand, if the disjunctive version ultimately emerges, cases manifesting adequate reason to search beneath the underwear will be constitutionally permissible without necessitating a danger assessment.

[232] *See supra* notes 147-59, 176-87 and accompanying text. It has been argued schools are "mediating institutions" between individuals and the state which instill constitutional values to students thus entitling schools to certain forms of constitutional protections. This in turn means that "many issues that appear to raise constitutional questions will be understood as issues that primarily raise questions of educational policy." *See generally* Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 670 (1987).

[233] "[C]ourts are not school boards . . . and are ill-equipped to determine the necessity of discrete aspects of a State's program of compulsory education." Wisconsin v. Yoder, 406 U.S. 205, 235 (1972). *See generally* James & Larson, *supra* note 2, at 4; Hafen,

How then are courts to understand and apply the danger factor in future strip search cases?

Rather than embrace *Redding*'s invitation to judicial policymaking, Justice Thomas opts for a "return to the common-law doctrine of *in loco parentis* under which the 'judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order.'"[234] Such a view advocates total removal of the Fourth Amendment from the school search context.[235] For Thomas, the alternatives appear to be either Fourth Amendment applicability with wholesale judicial oversight of educational policy decisions or no Fourth Amendment applicability at all.

Whatever the merits of Thomas's plea to remove Fourth Amendment applicability from schools, there is no indication that anyone else on the Court is inclined to find it attractive any time soon.[236] While Thomas's proposal is unrealistic, he is

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supra note 232, at 681 ("[T]he Supreme Court has been very reluctant actually to interfere with the discretion needed by authorized providers of child supervision."). One commentator summarized *T.L.O.*'s deference to educators as follows: "In essence the *T.L.O.* Court signaled that . . . in the school search context, it trusted those who worked in schools every day to better discern the importance of school rules than judges in far-off courtrooms." Ann Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools,* 65 GEO. WASH. L. REV. 49, 83 (1996).

[234] 129 S. Ct. at 2646 (Thomas, J., concurring in part and dissenting in part) (quoting Morse v. Frederick, 551 U.S. 393, 414 (2007) (Thomas, J., concurring)).

[235] While Thomas espouses judicial "reluctance" to intervene in school matters, his position clearly amounts to a rejection of Fourth Amendment applicability to school searches altogether. He distinguishes his position from *T.L.O.*'s "prevailing Fourth Amendment test," 129 S. Ct. at 2646, thus seemingly embracing the pre-*T.L.O.* view taken by some courts that the *in loco parentis* doctrine rendered the Fourth Amendment inapplicable to school searches because school officials stood literally in the place of the parent and thus acted in a private, non-governmental, capacity. *See, e.g.*, Mercer v. State, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970). This view is expressly accepted by Thomas, who advocates viewing school searches as delegations of parental authority, thus without the scope of Fourth Amendment protection. 129 S. Ct. at 2655-56.

[236] Justice Thomas's view is at odds with a variety of Supreme Court cases rejecting his view of the *in loco parentis* doctrine as a basis for denying constitutional protection for school students:

> Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment and the Due Process Clause of the Fourteenth Amendment. If school authorities are state actors for purposes of the consti-

nevertheless justified in his concern that *Redding* plants the seed for wholesale judicial second-guessing of the decisions of educators made in the exercise of their charge to maintain discipline and safety within their schools. This prospect is surely a recipe for chaos[237] and perhaps serious harm should educational officials become unduly hesitant to conduct searches necessary to protect their students out of fear of subsequent judicial sanction for their actions.[238] A clear need thus exists to find an approach which guides the courts in honoring Fourth Amendment values without, at the same time, transforming them into overseers of educational policy.

A. Suggestions

1. Eliminate the Danger Factor?

One way to prevent judicial overreaching would be to eliminate danger considerations from constitutional assessments of strip searches, and limit such inquiries to a requirement that *Redding*'s in the underwear factor be satisfied. Requiring that

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> tutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985) (citations omitted).

[237] One commentator observed that "entry into school discipline of so formidable a force as the courts and the judicial process may simply discourage some school officials from taking firm disciplinary action." J. Harvie Wilkinson, III, Goss v. Lopez*: The Supreme Court As School Superintendent*, 1975 SUP. CT. REV. 25, 68.

[238] A teacher who hopes to avoid trouble will not always respond right away to problems in the classroom. Rather than dealing with a problem immediately, careful teachers will either spend time trying to ascertain whether a court would find their suspicion reasonable or, more likely, will avoid the problem altogether to avoid any controversy. Dupre, *supra* note 233, at 95.

school officials have specific reason to believe that a student to be searched has hidden evidence of wrongdoing in her underwear is a sensible necessary threshold for valid strip searches, the permissible scope of which could be determined in light of the *T.L.O.* age and sex of the student considerations.[239]

At first glance, such an approach might appear appealing. While not an entirely "objective" matter, decisions about whether sufficient "reason" to believe contraband might be hidden in a student's underwear do not on their face invite the incursions into educational policy risked under the danger factor of the *Redding* standard.

Situations may arise, however, that counsel against the elimination of danger considerations from assessments of strip search constitutionality. Suppose, for example, school officials are informed on very good authority that some unknown student is carrying powerful explosives on his person and is intent on detonating them at school on the day the officials receive the information. The officials suspect no particular student nor have information leading them necessarily to believe that the student possessing the explosives has hidden them in his underwear. Thus, absent a standard that factored in considerations of danger, it would appear that the officials could not strip search any student. Yet, surely a strong argument can be made that under the circumstances the school officials should be able to search, even strip search, the entire student body until the explosives were confiscated without incurring Fourth Amendment liability.[240] A Fourth Amendment standard without danger considerations, but requiring reason to believe that evidence of wrongdoing is hidden in a student's underwear, may thus inhibit the officials from taking the very actions necessary to save the lives of their students.[241]

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[239] *See supra* notes 14-15 and accompanying text (discussing *T.L.O.*'s "nature of the infraction" consideration). It might also be relevant not to invite danger assessments but to limit searches to areas where the object of that infraction might be hidden, *see supra* notes 44-50 and accompanying text, although such a view appears entailed within the requirement that school officials have specific reason to believe contraband is hidden in the student's underwear before embarking on a strip search.

[240] Assuming, of course, that the search process does not itself create the risk of the student igniting the explosives in response to the searches. Such a risk could be reduced if school officials monitor the actions of each student until each is searched and exonerated.

It thus appears desirable to retain danger considerations in assessments of strip searches in schools. At the same time, it is desirable to do so in a manner that does not routinely involve the courts in deciding matters of educational policy.

2. Limited Judicial Danger Assessments: An Analogy to the Court's Eighth Amendment Proportionality Case law

The Court has confronted an analogous problem in its Eighth Amendment proportionality of punishment cases in which it engages in assessments of whether particular terms of imprisonment are proportional to the gravity of the offenses for which they are imposed.[242] Similar to assessments of "danger" under *Redding*, determining the danger posed by a given offense is essentially a policy question incapable of judgment under an objective standard.[243]

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[241] "The prospect of a lawsuit, with its resulting publicity, expense, and unpleasantness is hardly one that will be relished by either teacher or school administrator, even if the school and teacher are ultimately vindicated." Dupre, *supra* note 233, at 94. Of course, some school officials would risk Fourth Amendment liability and conduct wholesale strip searches until the danger to the school was alleviated. Others may take other actions such as immediately sending all the students home thus avoiding any student searches but risking an explosion that could physically damage the school and cause student injury and loss of life.

[242] *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 284-85 (1980) (holding life imprisonment with possibility of parole not disproportionate punishment under recidivism statute); Solem v. Helm, 463 U.S. 277, 303 (1982) (holding life imprisonment without possibility of parole disproportionate punishment under recidivism statute); Harmelin v. Michigan, 501 U.S. 957 (1991) (holding mandatory life imprisonment for possessing more than 650 grams of cocaine not disproportionate punishment); Ewing v. California, 538 U.S. 11, 30-31 (2003) (holding twenty-five years to life imprisonment not disproportionate punishment under recidivism statute).

[243] In its proportionality of punishment cases, the Court begins its analysis by addressing "the gravity of the offense compared to the harshness of the penalty" in light of the underlying purposes of punishment. *See, e.g.*, *Ewing*, 538 U.S. at 28. In reality this inquiry involves "not applying law but evaluating policy." *Id.* at 32 (Scalia, J., concurring). Indeed, proportionality of punishment analysis in general does not lend itself to objective analysis:

> The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world

In this light, some members of the Court, including Justice Thomas, have argued that assessments of offense gravity are inherently subjective and thus should be left entirely to policymakers.[244] In the same spirit as Justice Thomas's rejection of Fourth Amendment applicability to school searches, these Justices have argued that outside the context of capital punishment, the Eighth Amendment should not apply to questions of proportioning punishments to the gravity of the offenses for which they are imposed.

While a majority of the Court has recognized the unwisdom of involving courts in appropriate policy assessments when engaging in proportionality of punishment analysis,[245] it has nevertheless rejected the argument that such analysis should therefore be entirely outside judicial review.[246] Instead, the Court has adopted a very strong presumption in favor of legislative deference in determining appropriate punishments for given offenses.[247]

A similar approach should be adopted by courts making danger assessments under *Redding*. What follows is a suggested approach to assessing danger under *Redding* which allows for such within a framework affording proper deference to educators.

In making danger assessments under *Redding*, the views of Justice John Marshall Harlan provide a helpful way forward.

> enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

Harmelin, 501 U.S. at 986. Similarly, permitting judges to assess "danger" within the educational context "becomes an invitation to imposition of subjective values," thus allowing judges to evaluate the danger assessments of "the assemblage of men and women" educators charged with protecting schools from danger.

[244] *See Ewing*, 538 U.S. at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

[245] In expressing its "tradition of deferring to state legislatures in making . . . [the] important policy decisions" involved in enacting crimes and their respective punishments, the Court has recognized that such decisions involve "difficult policy choices" which should not, except in rare circumstances, be "second-guess[ed]" by the courts. *Ewing*, 538 U.S. at 24-25, 28 (Breyer, J., dissenting).

[246] *See supra* note 243.

[247] It will be a "*rare* occurrence" for a contested punishment to be found by a court as "gross[ly] disproportion[ate]" to the offense for which it is imposed. 538 U.S. at 36 (Breyer, J., dissenting). *See supra* note 243.

In reaching the proper balance between protecting the constitutional rights of students without impinging upon the expertise of educators, Justice Harlan argued:

> I am reluctant to believe that there is any disagreement . . . on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases [where students allege violations of their constitutional rights] . . . cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns . . . .[248]

Inquiry into "legitimate school concerns" should not invite judicial evaluations of whether particular school rules themselves adequately protect against dangers to the educational environment. As the *T.L.O.* Court stated:

> We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. . . . The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in schools and rules that are not.[249]

This adoption of the Harlan test would constitutionally entitle educators to decide whether strip searches are necessary to alleviate dangers to their students or to their educational mission except in rare cases where they act with indifference to school concerns and thus in bad faith.[250] There is no reason to believe that school officials would abuse such broad discretion by routinely conducting strip searches of their students.[251] The overwhelming majority of educators have their students' interests at heart, including their privacy concerns. They are likely aware of the possible traumatic effects of strip searches.[252] Indeed, when left to decide on their own, some educational policymakers have chosen to forbid strip searches altogether.[253] But, for those who see strip searches as a rare necessity in some circumstances, the Harlan standard would allow such searches when educators in good faith decide they are necessary to alleviate dangers to their schools.

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[248] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting).

[249] New Jersey v. T.L.O., 469 U.S. 325, 343 n.9 (1985). The *Redding* Court reiterated this point. *See supra* note 23 and accompanying text.

While this standard allows broad discretion without fear of judicial oversight, it is not toothless. Searches conducted maliciously, to harass, or with indifference to legitimate school concerns would violate the Fourth Amendment.

3. Rejecting a Conjunctive Standard

The reasons that counsel for retaining the danger factor in assessing strip search constitutionality also lead to rejecting a conjunctive version of the *Redding* standard. As illustrated by the case posed above where school officials have very good reason to believe that some unknown student possesses and intends to detonate powerful explosives,[254] situations may arise justifying strip searches where the danger factor is clearly satisfied but no reason necessarily exists to believe that any student has hidden contraband in his underwear. A conjunctive version of the *Redding* standard would preclude strip searches in such a case thus endangering the lives of both students and teachers.

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[250] Thus, if school officials conduct searches out of a desire to harass or humiliate a student rather than for legitimate school concerns, they act for an inappropriate reason and thus act in bad faith. Similarly, they act in bad faith if they conduct searches with indifference to legitimate school concerns, thus acting for no good reason. A subjective "good faith" test may appear at odds with the seemingly objective "reasonable suspicion" standard recognized by the *T.L.O.* Court as the governing test for Fourth Amendment assessments of school searches and seizures. *See supra* note 10 and accompanying text. I have argued, however, that the *T.L.O.* Court itself effectively embraced a good faith test in the name of 'reasonable suspicion." *See* Gardner, *supra* note 47, at 378-80. *See also supra* note 230. Some lower courts have similarly embraced a good faith test in non-strip search cases. *See* Gardner, *supra* note 47, at 388-92.

[251] "[T]eachers . . . who function in custodial and teaching roles make paternalistic decisions constantly, weighing the merits of the conflicting principles in each situation: order and liberty, inquiry and inculcation, love and discipline." Hafen, *supra* note 232, at 669.

[252] School officials regularly conduct in-service training with principals and school counselors updating them on search and seizure developments. *See, e.g.*, Interview with Jennifer C. Drahota, Principal, Westside Elementary, Norfolk Pub. Sch. in Lincoln, Neb. (Mar. 2, 2010).

[253] At least seven states have prohibited strip searches and a variety of individual school boards promulgated similar prohibitions. *See* Brief, *supra* note 29, at 14-15.

Having rejected the *conjunctive* version of *Redding*, the question then becomes whether the second, the in the underwear factor, remains relevant as part of a *disjunctive* standard given the interpretation of the danger factor argued for above. Under that interpretation, school officials will be presumed to search to alleviate a legitimate danger to their schools unless it is shown that they act in bad faith.[255] Under such a test, most strip searches will satisfy the danger consideration. For those that do not, the official will necessarily be acting for no good reason (indifference to school concerns) or for a malicious and patently bad reason. Under such circumstances, it appears that the second factor of the *Redding* standard (the in the underwear factor) has no work to do. School officials should not be permitted to strip search a student in bad faith simply because they have reason to believe the student has hidden some evidence of wrongdoing in his underwear. Thus, if a search is aimed at alleviating a school danger, it is permitted. If no danger exists, the search is not permitted. Applying Occam's Razor, the two-factor *Redding* standard should thus be reduced to a single consideration: danger to the educational environment.

The consequences of rejecting the conjunctive standard and granting educators broad discretion under the danger factor could lead to controversial results. Suppose, for example, that a school has adopted a rule against possessing chewing gum at school and that school officials possess good reason to believe that Student X possesses a stick of chewing gum somewhere on his person. Assuming that school officials are not in bad faith in enforcing the chewing gum rule, they would be justified in searching, indeed strip searching, Student X. It is, of course, likely that few, if any school officials, would actually strip search Student X in these circumstances given the apparent absence of significant danger.[256] However, as Justice White stated in an analogous context, "[t]his is cold comfort indeed" for absent a Fourth Amendment guarantee, "there would be no basis for deciding such cases should they arise."[257]

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[254] *See supra* notes 239-41 and accompanying text.

[255] *See supra* notes 248-50 and accompanying text.

While the Constitution may not protect Student X, parents and local government officials may challenge unwise educational practices and effectuate changes in policy through the democratic process.[258] Moreover, educational policymakers should themselves provide protection by, as argued below, fashioning regulations to guide educators in the exercise of their discretion.

The proposed test offers broad discretion to school officials virtually free from judicial oversight. At the same time, the test notifies educators that they may not strip search unless an educational danger is at stake. While admittedly vague, such a standard is not meaningless but functions as a "decision rule"[259] in defining broad, but not unlimited, governmental power to intervene in order to protect interests of vital importance to young people.[260] By mandating substantial judicial deference to school officials, the standard is thus perhaps as meaningfully addressed to educational policymakers as to courts. It grants educators the ability to adopt practices they deem necessary to protect their schools with minimal fear of judicial interference, while at the same time allowing for a modicum of constitutional student privacy protection. Moreover, as will be shown immediately below, the suggested standard provides a much clearer vehicle for assessments of the constitutionality of strip searches in schools than does *Redding*'s nebulous two-factor rubric.

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[256] It is likely that school officials would see a minimal degree of danger posed by chewing gum and choose not to strip search the student in this situation.

[257] Harmelin v. Michigan, 501 U.S. 957, 1018 (1991) (White, J., dissenting) (arguing why an Eighth Amendment proportionality principle is necessary to avoid the possibility of a legislature making overtime parking a felony punishable by life imprisonment, even though such a situation is almost certain never to occur). *See supra* notes 242-44 and accompanying text (discussing the analogy between danger considerations in assessing the constitutionality of strip searches and assessments of "gravity of offenses" in Eighth Amendment proportionality of punishment inquires).

[258] *See* Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2656-57 (2009) (Thomas, J., concurring in part and dissenting in part).

[259] For a discussion of the role played by "decision rules," as distinguished from "conduct rules," in allowing discretion for decision makers to exercise *parens patriae* power on behalf of young people, see generally Martin R. Gardner, *"Decision Rules" and Kids:" Clarifying the Vagueness Problems With Status Offense Statutes and School Disciplinary Rules*, 89 NEB. L. REV. 1 (2010).

4. Applying the Suggested Standard

The usefulness of the proposed standard is manifested by its application to the facts of the cases considered above, *Doe, Galford, Fewless,* and indeed to *Redding* itself. Such examination yields easy conclusions in each case establishing that each was wrongly decided.

In *Doe* and *Fewless*, school authorities had reason to believe that the students in the respective cases possessed marijuana in violation of both school and criminal rules. In both cases, the officials were clearly "motivated by legitimate school concerns" in conducting the searches and were thus seeking to alleviate an educational "danger." The searches were thus clearly constitutional.[261]

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[260] *Id.*

[261] Incidentally, in both *Doe* and *Fewless* the school officials also had reason to believe that the dangerous contraband was hidden in the respective student's underwear. In *Doe* the school officials had evidence, perhaps direct, that Doe was hiding contraband in her underwear when the dog continued to alert to her after the prior search of her clothing yielded no evidence. *See supra* notes 159-63 and accompanying text. Similarly, in *Fewless*, school officials possessed statements from arguably reliable informants specifically claiming that the student had hidden marijuana beneath his underwear. *See supra* notes 219-26 and accompanying text. But because an educational danger, marijuana in school, existed in both cases, inquiry into whether or not reason to search in the underwear is unnecessary as it would be in every case. *See supra* text accompanying note 256-57. Had the searches been motivated by something other than "legitimate school concerns," to harass or humiliate the students for example, they would have been unconstitutional regardless of the specific reason to believe Doe and Fewless, respectively, had hidden evidence of wrongdoing in their underwear.

Galford is perhaps a bit more difficult case. Even though the motivations for the search for the stolen money may have been partly grounded in "law enforcement" interests,[262] the search would also appear to have been conducted as a "school concern"[263] thus rendering the stolen money a "danger" to the educational environment[264] and therefore justifying the search.[265]

As for *Redding*, it is again clear that the search was conducted in a good faith attempt to protect students from the harm posed by the misuse of prescription drugs. There is no evidence that the search was motivated by anything other than "a legitimate school concern." The strip search was therefore constitutional.[266]

5. Suggested Educational Policy Regulations

The suggested standard grants broad discretion to educators to make decisions to strip search students. Such is obviously subject to potential abuse. For example, school officials who strip search students in a good faith attempt to enforce school rules thereby act legally but might nevertheless act unwisely.[267] Others might misuse their authority by hiding actual bad faith while conducting unnecessary strip searches by feigning good faith enforcement of a school rule.[268]

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[262] The money recovered by the school officials in *Galford* was turned over to the police who subsequently initiated delinquency proceedings against him. If such is a "law enforcement" matter, it might be treated under different standards than those governing school searches. *See supra* notes 83, 163-64, 191-92 and accompanying text.

[263] *See supra* note 248 and accompanying text.

[264] For a discussion of the "danger" presented by the stolen money in *Galford*, see *supra* notes 176-85 and accompanying text.

[265] Such a conclusion would, again, be reached without any inquiry into whether or not those searching Galford had specific reason to believe that he had hidden evidence of wrongdoing in his underwear.

[266] Such a conclusion was also reached by two of the lower courts deciding *Redding* prior to its consideration by the Supreme Court. The District Court for the District of Arizona found no Fourth Amendment violation, and a panel of the Ninth Circuit affirmed. Redding v. Safford Unified Sch. Dist. #1, 504 F.3d 828, 831 (9th Cir. 2007) (no reported opinion by the District Court).

[267] *See, e.g.*, *supra* note 256 and accompanying text. A strip search conducted in good faith in those circumstances would be legal but almost certainly unwise.

Much of this potential evil can be avoided if educational policymakers adopt regulations circumscribing their power consistent with their need to maintain discipline in their schools. As mentioned above, they might choose to forbid strip searches altogether. But if they see strip searches as sometimes necessary, a protocol for its employment should be in place.

Given the potential traumatic effects on students subjected to strip searches,[269] those making decisions whether or not to conduct such searches should be required to be familiar with the social science literature documenting the risks of trauma. Moreover, regulations might require exhaustion of all less drastic search alternatives, thus forbidding strip searches unless necessary[270] to avoid dangers to the educational environment. Such dangers could be defined, if possible, based on educational priorities of particular schools or districts.[271] Where searches are conducted for offenses prohibited by the criminal law, a preference for calling in law enforcement officers to conduct the searches might also be embodied in the regulations.[272] Regulations should require that searches should be conducted by persons of the same sex as the student being searched, that searches be conducted in private places, and that a second person of the same sex as the searcher be present to reduce the possibility of abuse of the student or claims of such. Finally, those fashioning the regulations should require notifying parents or guardians when a student in their charge is strip searched either as a prerequisite prior to the search[273] or after the fact depending on the policy judgment deemed appropriate.[274] By adopting regulations, even if minimal, educational policymakers will be forced to think carefully about when, if ever, strip searching students is justified and thereby make wiser decisions regarding its employment should that be their choice.

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[268] A school official might, for example, harbor intense animus towards a particular student and look for an excuse to harass and humiliate him by conducting a strip search.

[269] *See supra* note 29 and accompanying text.

[270] For an example of such a provision, see CHARLOTTESVILLE CITY PUBLIC SCHOOLS: SEARCH AND SEIZURE, 11-12 (Issued Aug. 17, 2009) [hereinafter CHARLOTTESVILLE REGULATION], which permits strip searches when "necessary" to address an imminent threat of death or great bodily injury to a person or persons." Policymakers who choose to require exhaustion of less drastic alternatives must realize, however, that such a requirement might create the possibility of judicial second-guessing of their decisions should students claim that less drastic alternatives were not exhausted. *See supra* note 87 and accompanying text.

[271] *See supra* note 270; *see also* MO. REV. STAT. § 167.166 (2009) (permitting strip searches where school officials "reasonably believe" a student possesses "a weapon, explosive, or substance that poses an imminent threat of physical harm to himself or herself or another person"). Note, however, that such terms as "weapon," "explosive," and "physical harm" are themselves relatively vague and subject to interpretation. Rather than limiting themselves to an ill-defined list of school "dangers," policymakers may instead prefer to rely entirely on the vague concept of "danger" itself as an "informal standard . . . permitting ad hoc situation sensitive decisions in particular cases." *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15 (1987).

V. CONCLUSION

The *Redding* case was anticipated with great interest as the vehicle through which the Supreme Court would provide meaningful direction in the weighty matter of determining the constitutionality of strip searches of school students in the context of an unsettled and confusing body of legal doctrine and delicate policy considerations. The *Redding* Court recognized and accepted the challenge, promising this time to provide a "sufficiently clear statement" of guiding principles to determine the legality of strip searches. Unfortunately, the Court failed to deliver, making an early lament of then Justice Rehnquist all too relevant: "Certainty and repose . . . may not be the destiny of man, but one might have hoped for a higher degree of certainty in this one narrow but important area of the law than is offered by today's decision."[275]

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[272] *See, e.g.*, CHARLOTTESVILLE REGULATION, *supra* note 270, and the Missouri statute, *supra* note 271, both of which require that strip searches be conducted by law enforcement officers unless the "seriousness of the situation" justifies searches by school officials, CHARLOTTESVILLE REGULATION, *supra* note 270, at subsection (12 & 13), or a "law enforcement officer is not immediately available," MO. REV. STAT. § 167.166(2). Note, however, that school searches by law enforcement personnel might ultimately be subject to a more rigorous Fourth Amendment threshold than those by school officials governed by the reasonable suspicion standard. *See supra* notes 83, 163-64 and accompanying text. The preference for strip searches by law enforcement, rather than school, officials may reflect a policy judgment that student/teacher trust is better perpetuated by not having an educator strip search her student. On the other hand, a strip search by a law enforcement officer—a total stranger to the student—might be more intimidating to the student than if the search were conducted by a school official familiar to the student.

[273] *See supra* note 97 and accompanying text.

[274] *See, e.g.*, CHARLOTTESVILLE REGULATION, *supra* note 270, at 14 (providing "parents or guardians shall be notified as soon as possible when any student has been the subject of a personal search"); MO. REV. STAT. § 167.166(4) (requiring that the district "attempt to notify the student's parent or guardian as soon as possible.").

The *Redding* Court is not even certain about the appropriate Fourth Amendment standard, articulating its newly identified two-factor test in two inconsistent conjunctive and disjunctive formulations. Assuming that the Court continues to embrace its two-factor standard in the future, it is imperative that it clarify whether it intends the conjunctive or disjunctive version.

This Article has shown that *Redding*'s uncertainties render it an inadequate vehicle for advancing analysis of the kinds of cases likely to face the courts in the future. Moreover, its invitation to judicial policymaking constitutes a new and highly unwise dimension to the Court's school search and seizure law.

With the safety and security of educational institutions and the dignity and psychological wellbeing of students at stake, a clear and effective standard is needed to guide decision makers in making hard judgments about the wisdom and the legality of strip searches of students. I have suggested such a standard, couched in terms of broad discretion to educators with recommended regulations that limit, or even ban altogether, the activity of strip searching students.

In the end, the question comes down to whether or not we can generally trust educators to have the best interests of all of their students at heart. A leading commentator put the matter this way:

> [I]f we are unwilling to defer to teachers when they are motivated by "legitimate school concerns," if we are unconcerned about the lack of respect that students show toward both public school teachers and the process of learning in

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[275] Steagald v. United States, 451 U.S. 204, 231 (1981) (Rehnquist, J., dissenting).

> that institution; if we are unwilling to trust public school educators to implement necessary disciplinary measures so that serious learning can and will take place, we should disband our nation's public schools and declare them a failed experiment.[276]

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[276] Dupre, *supra* note 233, at 105 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting)).

REASONABLE EXPECTATIONS OF PRIVACY FOR YOUTH IN A DIGITAL AGE

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> The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment . . . . The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.[1]

INTRODUCTION

"Technology is changing everything." This often repeated claim is made in so many contexts that it has become a cliché, but like many clichés, it is often true. Perhaps its impact is greatest with regard to what Brandeis and Warren, in their seminal 1890 Harvard Law Review article, described as the most fundamental right: the right to be left alone. We see technology's effect on that "right" in criminal litigation. Here courts struggle to apply the basic rule that the Fourth Amendment protects only reasonable expectations of privacy. However, the electronic erosion of privacy in everyday life cannot help but impact which expectations of privacy remain reasonable. This is compounded by the fact that many people in their teens and twenties arguably approach privacy differently than their older counterparts, some choosing to expose their thoughts, activities, and images to the inquisitive eyes of friends, acquaintances, and even strangers. Consider: 93% of American homes have computers and 84% of them have Internet access;[2] 66-71% of youth aged 8-18 own their own cell phones,[3] many of which have Internet access where youth engage in the most popular Internet activity, interacting with social networking.[4] On social networking sites, 64% of online 12-to-17-year-olds are not only obtaining content but creating and sharing it in the form of online journals, blogs, photo and video sharing.[5] As such activities become the norm, query what expectations of privacy remain reasonable. This is particularly apparent when one focuses on a subset of the population that has grown up in this new world order: youth.[6]

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[1] City of Ontario v. Quon, 130 S. Ct. 2619, 2629 (2010).

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[2] VICTORIA J. RIDEOUT ET AL., KAISER FAMILY FOUNDATION, GENERATION M2: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS, at 21 (2010); *see also* SONIA LIVINGSTONE & MAGDALENA BOBER, ECONOMIC AND SOCIAL RESEARCH COUNCIL, UK CHILDREN GO ONLINE 8 (2005) (finding that in 2005, 75% of 9- to 19-year-olds access the Internet from a home computer, game console, or digital television).

[3] RIDEOUT ET AL., *supra* note 2, at 3, 18; AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND MOBILE PHONES OVER THE PAST FIVE YEARS: PEW INTERNET LOOKS BACK 4 (2009).

[4] RIDEOUT ET AL., *supra* note 2, at 21; HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 1032-33 (25th ed. 2009) (defining social networking as "a website with a big database of information about people and their interests" characterized by the ability to create a personal profile, share photos or blogs, receive messages, limit it to a circle of friends, or open it to the public).

[5] AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, TEENS AND SOCIAL MEDIA: THE USE OF SOCIAL MEDIA GAINS A GREATER FOOTHOLD IN TEEN LIFE AS THEY EMBRACE THE CONVERSATIONAL NATURE OF INTERACTIVE ONLINE MEDIA 2, 4, 12 (2007).

[6] "Youth" is a general term. Some refer to this subset as, *inter alia*, "minors," "digital natives," or "teens." JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 346 (2008) (defining digital native as a person born in the digital age (post 1980) who has access to networked technologies, with strong computer skills and knowledge); Sonia Livingstone, *Taking Risky Opportunities in Youthful Content Creation: Teenagers' Use of Social Networking Sites for Intimacy, Privacy, and Self-Expression*, 10 NEW MEDIA & SOC'Y 393 (2008) (teenagers); MIZUKO ITO ET AL., JOHN D. & CATHERINE T. MACARTHUR FOUNDATION, LIVING AND LEARNING WITH NEW MEDIA: SUMMARY FINDINGS FROM THE DIGITAL YOUTH PROJECT 4 (2008) (youth). Because technology is so dynamic, trends among youth are so variable, and scholarship is so diverse in its demographic focus, no term is sufficient. The author adopts the imperfect terms "youth" or "digital native" to refer to the generation of technically connected young people who were born into a digitally connected norm, after the early 1990's when the Internet became a commercially available system used by the general public. *See, e.g.*, Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 438 (Md. 2009). However, as discussed *infra* Part II C, for legal analysis, the article focuses on a subset of youth—public school students—as they

In this digital age, individuals and society as a whole struggle to balance the advantages of digital connectivity against the reality that this very connectivity inevitably gives others access, licitly or illicitly, to private information.[7] While risks to privacy are certainly not limited to youth, an argument can be made that conceptualizations of privacy for those who have grown up with this technology are unique. One could further argue that as a group, youth possibly demonstrate distinct expectations of privacy when compared with older generations.[8] This article concerns the intersection of youth, technology, expectations of privacy, and the Fourth Amendment. More specifically, the article examines whether this "norm" of increased information disclosure, which can be characterized as conditioned, combined with decreased privacy rights in certain contexts effectively strips or compromises the Fourth Amendment protections of a class of people—youth.

It may be too early to fully measure technology's effect on privacy expectations of society as a whole. By focusing on a subset of society—youth—some of the questions are more manageably explored. By specifically examining students, and the reality that youth, as a group, may have a different concept of privacy online, this article seeks to explore a Fourth Amendment issue never before faced. What is society to do when a large subset of citizens, as a result of social or technological

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present the most pressing legal concerns due to the developed case law decreasing their privacy rights in a school setting.

[7] *See generally* MARY MADDEN ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, DIGITAL FOOTPRINTS: ONLINE IDENTITY MANAGEMENT AND SEARCH IN THE AGE OF TRANSPARENCY 1 (2007); MARY MADDEN & ADAM SMITH, PEW INTERNET & AMERICAN LIFE PROJECT, REPUTATION MANAGEMENT AND SOCIAL MEDIA (2010); *see also* PALFREY & GASSER, *supra* note 6, at 23 ("Young people—among many others—are using the Internet to share more personal information about themselves than ever before.").

[8] *See, e.g.*, PALFREY & GASSER, *supra* note 6, at 7 ("Digital Natives' ideas about privacy . . . are different from those of their parents and grandparents."); Press Release, PR Newswire, What is Privacy? Poll Exposes Generational Divide on Expectations of Privacy, According to Zogby/Cong. Internet Caucus Advisory Comm. Survey (Jan. 30, 2007), http://www.prnewswire.com/news-releases/what-is-privacy-poll-exposes-generational-divide-on-expectations-of-privacy-according-to-zogbycongressional-Internet-caucus-advisory-committee-survey-54015452.html ("[A] vast chasm exists between what 18-24 year-olds believe is an invasion of privacy and what other Americans consider to be an intrusion.").

conditioning and not government action, demonstrates an arguably lesser expectation of privacy? Part I of this article examines data regarding digital natives and their interaction with current technologies. Part II reviews current law regarding expectations of privacy in general, under the *Katz* test,[9] and more specifically, for public school students, under *New Jersey v. T.L.O.*[10] and *Safford Unified School District v. Redding*.[11] The article further reviews what guidance the Court has offered in situations where the familiar two-pronged *Katz* test is not useful. Part III reviews possible solutions to this problem, calling into question the utility of the *Katz* test. The article explores whether a more value-laden approach outlined by Justice Harlan in his dissent in *United States v. White* may offer a more promising solution than the traditional *Katz* analysis. Because the jurisprudence addressing searches of public school students in a school setting is developing, Part IV applies the different approaches offered by the Court to a hypothetical modification of the facts in *Redding*. In *Redding*, the Supreme Court held that when school officials conducted a virtual strip search of a teenage girl to investigate allegations that she possessed ibuprofen, they violated the girl's Fourth Amendment protection against unreasonable searches.[12] Suppose instead of the virtual strip search, school officials had seized her cell phone and examined its digital contents. This article explores that scenario and concludes that, for several reasons, the Supreme Court's current approach to applying the Fourth Amendment (often referred to as the "reasonable expectation of privacy" approach) is inadequate to sufficiently address the issues presented in this all-too-common scenario. It further argues that the proposal of Justice Harlan in *White* may be the pathway out of the problem.

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[9] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The "*Katz* test" refers to the two-pronged test proposed in Justice Harlan's *Katz* concurrence and later adopted in full by the Court.

[10] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[11] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009).

[12] *See infra*, note 134.

I. YOUTH, TECHNOLOGY, AND THE INTERNET

A. Youth and Technology

Much discussion is occurring regarding online activity's ability to compromise the user's privacy, regardless of his or her age. Indiscriminate sharing of information or ignorance of vulnerabilities are not activities limited to youth.[13] However, significant discussion is also taking place about the digital divide between older and younger generations.[14] It has been suggested that many people can roughly be categorized into two groups: "digital natives," i.e., those who were born and grew up in a post-commercialization of the World Wide Web, and "digital immigrants," i.e., those who have had to assimilate to a post-World Wide Web universe.[15] This divide manifests itself in a number of ways. This article will focus on one of those data points: youth and their expectation of privacy regarding media use. By "media use" this article speaks generally about the interconnectivity of the technological devices that allow for the consumption and creation of Internet content.[16] Technology is arguably reshaping social norms for young people, who are more likely than older citizens to read blogs, write their own blogs,[17] use social networking sites,[18] create personal profiles on those sites, update friends about their lives, or keep track of and communicate with friends on the Internet.[19] Prior to discussing the ramifications of this on privacy expectations, this article will review what is known about youth and their consumption and creation of content through media.[20]

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[13] MADDEN ET AL., *supra* note 7, at ii (Forty-three percent of online adults "neither worry about their personal information nor take steps to limit the amount of information that can be found out about them online."). MADDEN & SMITH, *supra* note 7, at 2 (noting that some Internet users are careful in how they project themselves online. Others "embrace an open approach" and "do not restrict what they share.").

[14] *See, e.g.*, SYDNEY JONES & SUSANNAH FOX, PEW INTERNET & AMERICAN LIFE PROJECT, PEW INTERNET PROJECT DATA MEMO: GENERATIONS ONLINE IN 2009, at 1-2, 5 (2009); *see also* MADDEN ET AL., *supra* note 7, at 20; PALFREY & GASSER, *supra* note 6, at 109, 125, 131 (discussing the technology gap between young people and many of their parents).

> Digital media and online communication have become pervasive in the lives of youth in the United States. Social network sites, online games, video-sharing sites, and gadgets such as iPods and mobile phones are now fixtures of youth culture. . . . [L]ess than a decade ago these technologies had barely registered in the lives of U.S. children and teens.

ITO ET AL., *supra* note 6, at 4; *see also id.* at 36. However, scholars caution against an assumption that youth are unconcerned with privacy. *See generally* Susan C. Herring, *Questioning the Generational Divide: Technological Exoticism and Adult Constructions of Online Youth Identity*, *in* YOUTH, IDENTITY & DIGITAL MEDIA 71, 86 (David Buckingham ed., 2008); *see also Protecting Youths in an Online World*: *Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, and Ins. Comm. on Commerce, Sci., and Transp.*, 111th Cong. 2-5 (2010) (prepared statement of the Federal Trade Comm'n); danah boyd & Eszter Hargittai, *Facebook Privacy Settings: Who Cares?*, FIRST MONDAY, Aug. 2, 2010, at 2.

[15] *E.g.*, NEWTON, *supra* note 4, at 369 (referencing a 2005 Rupert Murdoch speech describing one who came to the Internet later in life as a "digital immigrant"); Herring, *supra* note 14, at 71 ("Children born in the mid- to late-1980s and the 1990s have been labeled the 'Internet Generation': the first generation to grow up in a world where the

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Internet was always present." This generation is also called the "Net Generation," the "Net-Gen," "Generation i," the "Digital Generation," or the "Millenials.").

[16] *See* RIDEOUT ET AL., *supra* note 2, at 2, 10 (tracking media use such as the watching of television programming on a variety of platforms, listening to music, using computers, playing video games, reading print, or watching movies).

[17] "The word *blog*, used as a noun, is a contraction of the words *Web* and *Log* and generally describes a site that 'contains dated text entries in reverse chronological order (most recent first) about a particular topic.' (citation omitted). A blog can serve as an online newsletter or as a personal journal—where an individual can post concerns, ideas, opinions, etc.—and it can contain links to web sites or can use images or video." Indep. Newspapers v. Brodie, 966 A.2d 432, 437 (Md. 2009); *see also* NEWTON, *supra* note 4, at 197.

[18] Social Networking sites are defined as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system." danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 2 (2007). boyd prefers the term "social network sites" because participants do not network as much as communicate with people already part of their network. *Id.*; *see also* PALFREY & GASSER, *supra* note 6, at 350 (defining "social networking sites" as "a site . . . that connects . . . people in order to enable the flow of information among users"). Scholarship utilizes both terms as will this article. The MacArthur Foundation Report uses the term "networked publics" to "describe participation in public culture that is supported by online networks." ITO ET AL., *supra* note 6, at 10.

[19] JONES & FOX, *supra* note 14, at 3.

[20] Of course, one should be cautious about over-generalization. No subset of society can be indiscriminately grouped under one label as acting uniformly. What follows is a collection of general trends. Certainly within the imperfect label "youth," *see supra* note 6, there are individual behaviors outside of these trends and many factors (access to technology, chief among them) contribute to practices. *See* Alice Marwick, Diego

Two aspects of youth participation with the Internet are relevant to the privacy discussion. These include first, the number of different platforms through which youth are accessing the Internet, and second, their online activities that include both media consumption and content creation.

Media use is no longer limited to any one platform, such as the television or the computer. The explosion of mobile media and its access to the Internet has fueled an increase in both media consumption and content creation.[21] The Kaiser Foundation found that young people spend an average of 7:38 hours a day "using media," excluding computer use for schoolwork.[22] "Media use" encompasses television content, music, video games, print, movies, and the Internet.[23] This amount of time represents a significant increase, in the past five years, of all forms of media use with the exception of reading.[24] The increase of the availability and use of mobile and online media has fueled this growth with "[t]he vast majority of young people now carry[ing] devices on which they listen to music and in many cases connect to the Internet and watch videos."[25] This transformation of the cell phone from a telephone into a media content delivery platform facilitated the "explosion in media consumption among America's youth."[26]

Murgia Diaz, & John Palfrey, *Youth, Privacy and Reputation* 12-21 (Berkman Ctr. Research, Publ'n No. 2010-5 & Harvard Pub. Law, Working Paper No. 10-29, 2010), *available at* http://ssrn.com/abstract=1588163; *cf.* MADDEN & SMITH, *supra* note 7.

[21] RIDEOUT ET AL., *supra* note 2, at 2-3. Cell phone ownership grew among teens from 39% to 66% in just five years. *Id.* at 3, 10, 18. The Pew Center reports that 71% of teens own cell phones, with 84% of 17-year-olds doing so. LENHART, *supra* note 3, at 7-8.

[22] RIDEOUT ET AL., *supra* note 2, at 2. If one were to include multi-tasking among different forms of media separately, then the total time would rise to 10:45. *Id.* at 4.

[23] *Id.* at 2, 6-7, 10. In another study, students in seventh, eighth and ninth grades reported spending an average of 21 hours per week engaged in "various online activities." SAMUEL C. MCQUADE, III & NEEL SAMPAT, ROCHESTER INSTITUTE OF TECHNOLOGY, SURVEY OF INTERNET AND AT-RISK BEHAVIORS 29, 31 (2008).

[24] RIDEOUT ET AL., *supra* note 2, at 2.

[25] *Id.* at 3.

[26] *Id.* at 3, 18; LENHART, *supra* note 3, at 8 (cell phone is the dominant form of communication for teens); MCQUADE & SAMPAT, *supra* note 23, at 28 (as students get older, devices are increasingly used for interactive communication). Cell phones are no longer simply devices with which to speak to others, but "have morphed from a way to hold a conversation with someone to a way to consume more media." RIDEOUT ET AL.,

This increase in platforms provides youth with more varied ways not only to consume, but to create content and share information. This reality directly affects what young people perceive as private. For example, computers used to be necessary in order to engage in the most popular computer activity—interacting within social networking sites.[27] Now, with most cell phones having Internet connectivity, this activity can be done from multiple platforms and locations. One can take a picture or video, update his or her location, notify contacts, a.k.a. "Friends," "fans," or contacts,[28] and post the picture or video on the Web without ever sitting down at a computer.[29]

An important aspect of media use is content creation. It is here, at the social networking site, as well as other fora, in which content creation occurs and has the potential to signifi-

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supra note 2, at 3; *see also* AARON SMITH, PEW INTERNET & AMERICAN LIFE PROJECT, MOBILE ACCESS 2010, at 2 (2010), *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_Mobile_Access_2010.pdf (noting the growth of the use of non-voice data applications on cell phones). For example, one study reports seventh to twelfth graders spend an average of 90 minutes per day sending an average of 118 text messages. RIDEOUT ET AL., *supra* note 2, at 18.

[27] RIDEOUT ET AL., *supra* note 2, at 21 (noting that 25% of seventh to twelfth graders' recreational time is spent on social networking sites, and 15% watching videos on YouTube-type web sites).

[28] Following the lead of Professor Grimmelmann, this article will use the term "'contact' to describe a user with whom one has an explicit link on a social network site." James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1143 (2009). The label given to one's network of contacts will be used generally, or with respect to Facebook "Friends" as distinct from the colloquial "friends." "Friends" are people within a social networking site who enjoy privileges such as being able to view one's profile or other information. PALFREY & GASSER, *supra* note 6, at 347.

[29] *See* ITO ET AL., *supra* note 6, at 26 ("[P]ersonal photos . . . are readily available in social contexts mean[ing] that visual media become more deeply embedded in the everyday communication of young people."). Much social networking time is spent both creating content and exploring that of others. The numbers participating in this are staggering, with Facebook claiming to have more than 500 million active users who produce 60 million status updates per day, upload 3 billion photos each month, and share 530 billion pieces of content each week. *Press Room: Statistics*, FACEBOOK, http://www.facebook.com/press/info.php?statistics (last visited Jan. 21, 2011). Additionally, MySpace claims to have more than 100 million active users. Gregory Spizer, *Understanding of Social Media Intrinsic to Modern League Practice*, 241 LEGAL INTELLIGENCER 5 (2010). Teens joined MySpace *en masse* in 2004, and most teens with profiles have them on MySpace. boyd & Ellison, *supra* note 18, at 7; AMANDA LENHART & MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, PEW INTERNET PROJECT DATA MEMO: SOCIAL NETWORKING WEBSITES AND TEENS: AN OVERVIEW 1-2 (2007).

cantly implicate privacy. Sixty-four percent of youth online between the ages of 12 and 17 have participated in creating content by sharing photographs, stories, video, and art; creating or working on web pages or blogs for themselves or for others; and creating an online journal or maintaining their own web page.[30] This may initially appear merely as a new way for youth to communicate and, therefore, raises no more privacy implications than the adoption of the telephone. However, youth's sense of the private nature of this material is remarkable and has created some concern. Social network sites require the member to post a profile replete with personal information. For example, "[a] fully filled-out Facebook profile contains about forty [data points of] personal information, including . . . religious views[,] . . . contact information[,] . . . [and] sexual preference," all information previously considered by the law as personal.[31] Their social networking pages can contain personal information about their location, plans, associates, much like a personal diary and address book, simply all online. Blog creation or commentary doubled between 2004 and 2006.[32] Forty-seven percent of online teens have uploaded pictures where others can see them, and 14-25% have posted videos.[33] While a minority of teens (21%) consistently shares photos without restrictions, only 38% restrict access "most of the time."[34] However, "for the most part, teens who post video files want them to be seen," with 46% of video posters reporting they never restrict access to videos.[35]

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[30] Thirty-nine percent share photos, stories, and art; 33% create work on blogs and web pages for others; 28% create their own journal; 27% maintain their own web page, and 26% remix content to create their own. LENHART ET AL., *supra* note 5, at i, 34; *see also* Livingstone, *supra* note 6, at 4 ("[M]ore than ever before using media means creating as well as receiving."). Girls are more active in content creation, with 55% of such creators being girls. LENHART ET AL., *supra* note 5, at 4; *see also* MADDEN ET AL., *supra* note 7, at 19 (reporting in 2007 that 33% of adult Internet users post creative content online and 36% upload photos, while 47% of teens do so).

[31] Grimmelmann, *supra* note 28, at 1149-51 (listing all information available on a Facebook profile and how it is used); *see also* DAVID KIRKPATRICK, THE FACEBOOK EFFECT: THE INSIDE STORY OF THE COMPANY THAT IS CONNECTING THE WORLD 201 (2010) ("Many users willingly fill out extensive details about their career, relationships, interests, and personal 'history.'").

[32] LENHART ET AL., *supra* note 5, at ii, 8. Additionally, four out of five social networking users posted messages on a wall (89% of girls and 79% of boys). LENHART & MADDEN, *supra* note 29, at 6.

[33] LENHART ET AL., *supra* note 5, at i, ii, 14 (14%), 13 (47%); RIDEOUT ET AL., *supra* note 2, at 22 (25%). This is in contrast to 8% of adult Internet users. MADDEN ET AL., *supra* note 7, at 19.

> The vast array of data points that make up "personal information" in the age of online media are nearly impossible to quantify or neatly define. Name, address, and phone number are just the basics in a world where voluntarily posting self-authored content such as text, photos, and video has become a cornerstone of engagement in the era of the participatory Web. The more content we contribute voluntarily to the public or semi-public corners of the Web, the more we are not only findable, but also knowable.[36]

Additionally, social networking sites offer various avenues to communicate, such as private messages, messages posted on friends' web pages, or comments on others' blogs to name a few.[37]

B. Online Youth and Privacy

Recent scholarship stresses that while digital natives may conceptualize privacy differently, that does not translate into devaluing privacy.[38] Despite a media panic, much research indicates youth use this new media more to reach out to friends with whom they usually socialize than to be in contact with adult strangers.[39] When asked about their attitudes toward privacy, youth express a concern about both corporate access and social access to personal information.[40] Indeed, Livingstone suggests that the distinction between youth and older citizens is not a lack of concern about privacy but a different definition of privacy in which young people define it without regard to the types of information revealed, but rather, regarding control over who learns the information.[41]

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[34] LENHART ET AL., *supra* note 5, at iii, 14.

[35] *Id.*

[36] MADDEN ET AL., *supra* note 7, at i.

[37] LENHART & MADDEN, *supra* note 29, at 6. Ninety-one percent of youth who use social networking use it to stay in touch with friends they see frequently and 72% do so to schedule or coordinate with friends. *Id.* at 2, 6. Twenty-six percent of youth send messages (email or Instant Messages ("IM")) through social networks. Also, of all of the youth who use social networks, 54% send IM or texts through such sites. LENHART ET AL., *supra* note 5, at 8, 12.

[38] *See, e.g.*, Marwick et al., *supra* note 20, at 60; ITO ET AL., *supra* note 6; MADDEN & SMITH, *supra* note 7; boyd & Hargittai, *supra* note 14.

[39] ITO ET AL., *supra* note 6, at 26; Livingstone, *supra* note 6, at 4-5 (referring to a "media panic" that "amplif[ies] public anxieties" associated with social networking and that teenagers have "no sense of privacy or shame").

While research does support a notion that youth and young adults care about privacy, and are at times more active in managing their online reputation than older users, it also supports that such attitudes do not always translate into practices that protect privacy.[42] For example, a study comparing young adults' privacy attitudes and actions within social networks found a "dichotomy between [Facebook] members' stated privacy concerns (high) and actual information hiding strategies" due to peer pressure, unawareness, and a level of trust toward Facebook.[43] While youth appear to recognize the vulnerability of private information disclosed to peers who might forward that information to others, some scholarship suggests they are arguably (or seem to be) less aware of the fact that their online activities expose private information to the world at large.[44] The picture is not clear, however. Research among young adults suggests an emerging landscape in which those 18-29 year olds who are more skilled and engaged on social networking sites are more likely to modify their profile and manage their reputation.[45]

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[40] Chris Hoofnagle et al., *How Different Are Young Adults From Older Adults When It Comes To Information Privacy Attitudes and Policies*, SSRN Research Paper 3, 12 (Apr. 14, 2010), *available at* http://ssrn.com/abstract=1589864 (finding that when young adults were asked about attitudes regarding collection and use of personal information, their response did not differ greatly from adults); Allessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook* (PET 2006) (similar study of university community members found attitudinal concern).

[41] Livingstone, *supra* note 6, at 10; MADDEN & SMITH, *supra* note 7, at 5-6 (noting the debate among scholars and the argument that Internet users sensitivity to privacy concerns are "highly dependent on context" and often "oversimplified."). Marwick et al., *supra* note 20, at 60-61. Defining and conceptualizing privacy is a herculean task. For a thoughtful discussion of various conceptualizations of privacy, and their critiques, see DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 14-38 (2008).

[42] boyd & Hargittai, *supra* note 14, at 2 (noting that research suggests that young adults (18- to 29-year-olds) are conscious of privacy issues and more actively manage the access to profiles; but acknowledging a lack of information regarding the extent to which these changes meet their privacy preferences). Hoofnagle et al., *supra* note 40, at 17-18 (finding differences between attitudes regarding collection of personal data and the practices of protecting such personal data); Acquisti & Gross, *supra* note 40.

[43] Acquisti & Gross, *supra* note 40, at 13, 17; *see also* Livingstone, *supra* note 6, at 10-11 (teenagers' primary goal is not to hide information from strangers, but to share private experiences with friends).

"The divergence in privacy norms between heavily wired teens and their parents (to say nothing of their grandparents) is striking; the personal information *already* online would suffice to ruin the political careers of millions of young people if they were judged by the standards we apply to adult politicians."[46] One-third of online teens display personal information with no limitations at all.[47] Moreover, the remaining two-thirds only limit it "in some way."[48] This may reflect in some cases actual and effective limits, but in other cases, minimal limits such as only allowing "only contacts" to view their information, but then accepting any request to be a contact, thus exposing their private information to large numbers of people.[49]

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[44] On the one hand, the Pew Center reports "fewer communications are private anymore . . . [and] the most commonly experienced bullying is having someone take a private email, IM, or text message, and forward it to someone else or post it publicly." AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, CYBERBULLYING AND ONLINE TEENS 2-3 (2007); *see also* MCQUADE & SAMPAT, *supra* note 23, at 13, 16, 27 (noting that students are more likely to be victimized, including hacking and bullying, by other students whom they know); boyd & Hargittai, *supra* note 14 (calling for more research on the alignment and between preferences and practices). Notwithstanding this, scholars observe that the "backbone" of social networking sites remains the "visible profiles that display an articulated list of Friends who are also users of the system." boyd & Ellison, *supra* note 18, at 2; *see also* MADDEN & SMITH, *supra* note 7, at 6 (discussing how young adults online are more active online managers of reputation, but many adults take the "path of least resistance" in managing their reputation online).

[45] boyd & Hargittai, *supra* note 14, at 18, 20, 25; MADDEN & SMITH, *supra* note 7.

[46] Emily Nussbaum, *Say Everything*, N.Y. MAG., Feb. 12, 2007, at 24 ("More young people are putting more personal information out in public than any older person ever would—and yet they seem mysteriously healthy and normal, save for an entirely different definition of privacy.").

[47] In fact, 77% of teens who create a profile say it is visible online. LENHART & MADDEN, *supra* note 29, at 5. Although a comparable percentage of adults (82%) report the same, a much larger percentage of youth (55% and 20% of adults) have profiles. MADDEN ET AL., *supra* note 7, at 20.

[48] LENHART & MADDEN, *supra* note 29, at 5; LENHART ET AL., *supra* note 5, at 13; MADDEN ET AL., *supra* note 7, at 20.

One may wonder why people, particularly young people, compromise their privacy so extensively through social networking sites. Some scholars believe that users need to perceive a benefit in exchange for privacy disclosure risks. Grimmelmann argues that social networking sites offer three important motivators: identity, relationship, and community.[50] The Internet allows one to create an identity, to advertise it to develop relationships (some fleeting), and to establish oneself as a leader in a given community. Disclosure of information, for example, compiling a large number of contacts to establish oneself as popular, appears inversely related to privacy risks.[51] Livingstone argues that teenagers are attracted to online interaction because it is a space to experience adolescence (for some, to construct personalities, for others, to take risks) without observation.[52] "The complex relationship between opportunity and risk is not distinct to the Internet but is, rather, a feature of adolescence."[53]

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[49] *In Study, Facebook Users Share with Stranger*, WALL ST. J., Aug. 14, 2007, at B3 (discussing research from Sophos Security firm claiming 41% of Facebook users were willing to share personal information with a stranger); *Facebook: The Privacy Challenge*, SOPHOS.COM, http://www.sophos.com/security/topic/facebook.html (last visited Nov. 8, 2010) (Forty-six percent of Facebook users accepted Friend requests from fictional stranger, 89% of users in their 20s divulged birth dates, and 30-40% of users disclosed data about friends and family); David Ramsay, *Marshwood Middle School Parents Told 58 out of 60 Kids Accepted Unknown Facebook Friend*, SEACOAST ONLINE (Nov. 21, 2009, 2:00 AM), http://www.seacoastonline.com/articles/20091121-NEWS-911210335 (reporting that Internet safety expert connected with 60 honors students and 58 of them allowed her to "Friend" them without knowing who she was).

[50] Grimmelmann, *supra* note 28, at 1151-56; *see also* PALFREY & GASSER, *supra* note 6, at 25 (discussing the importance of identity to the digital native and the reasons why they share information, including to build trust with others); boyd & Ellison, *supra* note 18, at 7; Livingstone, *supra* note 6, at 10 ("[T]eenagers must and do disclose personal information in order to sustain intimacy . . . ."); *see also id.* at 5.

[51] Contacts or "Friends" may be added by friends or strangers. Grimmelmann, *supra* note 28, at 1175. The visibility of said profiles and list of contacts is crucial and varies among social networking sites, many of which are by default available to the public or others, whose visibility the user limits to a circle of contacts. boyd & Ellison, *supra* note 18, at 3. While "Friends" require confirmation from both parties, some others do not. *Id.*

[52] Livingstone, *supra* note 6, at 5.

[53] *Id.*

While the idea of youth creating and experimenting with different social identities is not new, a significant difference is that youth are doing so in digital formats that can be easily accessed by anyone and difficult to manage.[54]

1. Commercial Interest in Obtaining Personal Information and Risk-Taking Youth

Notwithstanding a perception of privacy, research indicates that youth often use the Internet to publicly share a variety of sensitive information.[55] While youth may characterize some of this material as limited in access, the accuracy of this perception is likely to continuously falter, particularly as the companies that facilitate social networking make more and more of their information searchable, and repeatedly change their privacy policies.[56]

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[54] PALFREY & GASSER, *supra* note 6, at 30, 44. While 55% of online teens create profiles, only 20% of adults did so in 2006. MADDEN ET AL., *supra* note 7, at 1. While Madden reports that young adults (18-29) most actively manage their privacy settings, they also "are by far the most likely to say that they have posted content to social networking sites that they later regret sharing." MADDEN AND SMITH, *supra* note 7, at 30.

[55] MCQUADE & SAMPAT, *supra* note 23, at 9, 15, 29. Acquisti and Gross note that the combination of weak security controls by design combined with decreasing costs for data mining mean "ostensibly private social network" data is public. Acquisti & Gross, *supra* note 40, at 2 ("unprecedented phenomena of information revelation"). For example, children as young as the fourth through sixth grades "frequently" engage in social networking activities involving posting "personal, potentially exploitable, information about themselves online." MCQUADE & SAMPAT, *supra* note 23, at 9; *see also id.* at 15 (Twenty-two percent of tenth through twelfth graders provide personal information online); *id.* at 29 ("[P]robably due to the increased popularity of social networking sites many students [in grades seven through nine] are using the Internet to publicly post a variety of sensitive information.").

[56] While youth may feel that they are the customers of the social networking site, this is indeed a misperception. A customer is an entity who pays the social networking sites for the service. Profits for most social networking sites do not come from members, but the advertisers who seek the personal information available on social networking sites for targeted marketing. *See Is Social Network Advertising Ready for Prime Time?*, EMARKETER.COM, http://www.emarketer.com/Article.aspx?R=1007165 (last visited Nov. 8, 2010) (projecting that "US marketers will increase social network ad spending 13.2% in 2010, [up] to $1.3 billion"). "Facebook makes personal data provided by users available to advertisers, in aggregated form, for its own commercial gain." KIRKPATRICK, *supra* note 31, at 202. Indeed, one of Facebook's co-founders stated as much when he said Facebook "can provide really good, relevant advertising to people because they tell us exactly what they are interested in, and who they know, and those

Facebook itself is an excellent example of the changing tides of a social networking site. It originated as a closed network for Harvard University, grew rapidly to several hundred universities, eventually expanded to high school students, and ultimately opened unlimited access to anyone claiming to be over 13 years old.[57] While it originally kept profiles internal, currently "limited profiles" are searchable on the Internet with any search engine.[58] Although the changes admittedly did not occur without notice to members, more specific changes in privacy, which always move in the direction of decreasing privacy, take place. This is consistent with the Facebook Terms of Use,

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people tell us what they're interested in." Alexei Oreskovic, *Revenue Tops $800 Million for Facebook*, TORONTO STAR, June 19, 2010, at B4. EMarketer reports that "social network users create a gigantic amount of data about themselves—their friend networks, likes and dislikes, content-sharing activities and more." *Is Social Network Advertising Ready for Prime Time?*, *supra*. This prompted an analyst to describe social networking sites' advertising as "a marketer's dream come true." *Id.* Such sites' customers, (i.e., profit sources) are online advertisers. The product they sell these advertisers is the users' information. So, far from being the customer, youth and all users of social networking sites are, in fact, the product sold. Acquisti argues that social networking sites are *imagined* communities because security-access controls are weak by design to make it easier for people to join and contact others through sharing of personal information, hence, its commercial value. Acquisti & Gross, *supra* note 40, at 3 (discussing financial profits such sites have made from marketers, among other things). Livingstone expounded on this concern by noting that privacy settings are inadequate in affording teenagers the level of intimacy they want. Livingstone, *supra* note 6, at 11 (noting the "(mis)match between technological affordances and teenagers' conceptions of friendship"); *see also* boyd & Hargittai, *supra* note 14, at 25 (noting the vulnerability of the population of least skilled Internet users is magnified by how companies set up or modify default privacy settings); PALFREY & GASSER, *supra* note 6, at 56 (documenting the evolution of default privacy settings on Facebook and MySpace to allow increased search ability). Similarly, big businesses search the web for information on individuals to obtain and store what they value. *Id.* at 45, 56-58, 65 (documenting the lack of awareness among young people to protect privacy and the challenge of staying current with privacy policies).

[57] FACEBOOK, *Privacy Policy*, http://www.Facebook.com/policy.php (last visited Aug. 25, 2010). Kirkpatrick argues, however, that its membership is "common among younger and younger children—it is now commonly used by many eleven-year-olds and those even younger, despite Facebook rules that users must be thirteen." KIRKPATRICK, *supra* note 31, at 205.

[58] Grimmelmann, *supra* note 28, at 1169.

which allow Facebook to change its privacy policies unilaterally.[59]

For example, in 2006, Facebook attempted to implement a new feature entitled "Newsfeeds," which displayed a list of a member's every action to all one's "Friends." This resulted in the broadcasting of every change in status, addition, or deletion of a Friend, comment made, or group joined to all of the member's Friends.[60] This outraged members, the largest group being Students Against Facebook Newsfeeds, which grew to boast several hundred thousand members.[61] Facebook partially retreated from its original plan and allowed users more control and also the ability to exclude certain items from appearing on other Friends' Newsfeeds.[62]

Similarly, in April of 2010, Facebook unilaterally moved to expand Facebook functions across the Web.[63] The new policy "required users to opt out if they wished to keep information private, making most of the information pubic by default."[64] The "opt out" provision required a member to sift through approximately 150 options and determine to whom the information would be made available, making what privacy controls were available "effectively unusable for many people."[65] Additionally, the site planned an "instant personalization" feature that allowed outside partner sites (such as Pandora.com and yelp.com) to gain access to personal data of members.[66]

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[59] *See, e.g.*, Caroline McCarthy, *Do Facebook's New Privacy Settings Let It Off the Hook?*, CNET NEWS, (May 26, 2010, 12:07 PM), http://news.cnet.com/8301-13577_3-20006054-36.html (noting that concern about "how easily and willfully [Facebook] could make a major turnaround in user experience" with its privacy changes); Grimmelmann, *supra* note 28, at 1183. Facebook also warns users that it may retain data on them even after they delete their accounts, that it may surveil them even when they're not using Facebook, that it uses their information for marketing purposes (including targeted ads), that it retains discretion over whether and when to share their information with their parties, and that sometimes Facebook even deliberately gives out accounts to let outsiders see what's going on inside. FACEBOOK, *supra* note 57, para. 9 "Other Terms"; *see also* KIRKPATRICK, *supra* note 31, at 204. Indeed, when some questioned the privacy implications of Twitter archiving all messages with the Library of Congress, a Library representative cited to the user's agreement to the terms of service. Steve Lohr, *It's History, So Be Careful Using Twitter*, N.Y. TIMES, Apr. 15, 2010, at B2.

[60] Grimmelmann, *supra* note 28, at 1146.

[61] DANIEL J. SOLOVE, THE FUTURE OF REPUTATION 169 (2007).

[62] Grimmelmann, *supra* note 28, at 1146; boyd & Hargittai, *supra* note 14, at 4.

[63] Miguel Helft & Jenna Wortham, *Facebook Bows to Pressure Over Privacy*, N.Y. TIMES, May 27, 2010, at B1.

[64] Nick Bilton, *Price of Facebook Privacy? Start Clicking*, N.Y. TIMES, May 13, 2010, at B8.

After weeks of pressure from outraged users, privacy advocates, and government officials, Facebook announced a change to this policy.[67] Not retracting completely, the default remained that the information was publicly available. However, it did create a much simpler method of adjusting who could view one's information, creating simpler controls for the user who could now limit about fifteen categories of information to be visible to Friends, Friends of Friends, or everyone on the Internet.[68] The publicly available information in its directory of users was also limited to less information than it previously required of members.[69] These potentially privacy compromising actions by Facebook continue in 2011.[70]

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[65] Helft & Wortham, *supra* note 63; Bilton, *supra* note 64 (asserting that the opt-out provision required users to click through more than 50 privacy buttons, choosing among more than 170 options); Mark Zuckerberg, *From Facebook, Answering Privacy Concerns With New Settings*, WASH. POST, May 24, 2010, at A19 (CEO of Facebook acknowledging that members felt privacy controls were too complex).

[66] Helft & Wortham, *supra* note 63; Chloe Albanesius, *Facebook Updates Privacy Policy, Promises Simpler Process*, PCMAG.COM., (May 26, 2010), http://www.pcmag.com/article2/0,2817,2364199,00.asp. Under "instant personalization," when a Facebook user visits a site, the site can use the user's public Facebook information, including the name, profile picture, and Friends' information to "personalize the experience." Clint Boulton, *Facebook Instant Personalization Protested by EFF, MoveOn.org*, EWEEK.COM, (May 2, 2010), http://eweek.com/c/a/Web-Services-Web-20-and-SOA (follow "3" hyperlink to the third page of articles; then click "Facebook Instant Personalization" hyperlink).

[67] Helft & Wortham, *supra* note 63.

[68] *Id.*; Albanesius, *supra* note 66; McCarthy, *supra* note 59 (describing the new privacy settings).

[69] Helft & Wortham, *supra* note 63. For a discussion of Facebook privacy related controversies and its relation to the corporate view of transparency, see KIRKPATRICK, *supra* note 31, at 199-214. Facebook is not alone. Google, in an attempt to create a social networking service, Google Buzz, initially automatically enrolled all Gmail users in this network and unilaterally connected people, thus sharing user's information with the public and making some posts public without Gmail users' knowledge. Miguel Helft, *Critics Say Google Invades Privacy with New Service*, N.Y. TIMES, Feb. 13, 2010, at B1; *see, e.g.*, Mukul Kumar, *Making Content Social*, FIN. EXPRESS, Feb. 25, 2010. While Google eventually made some changes in the program, it prompted some to wonder if automatically changing Gmail accounts to Google Buzz accounts and then pro-

2. Official Interest in Personal Information and Risk-Taking Youth

While such commercial activity combined with youth risk-taking demonstrates the immediate risks to privacy, Palfrey and Gasser persuasively note that the long-term impact for youth has yet to be determined:

> The problem of privacy is exacerbated for young people by the fact that we are just at the beginning of the digital age. . . . Digital Natives will be the first to experience the compounding effects of the creation of identities and digital dossiers over a long period of time. . . . The extent of the damage caused by harmful information—in terms of who can access it, when, how, and over what period of time—continues to increase as the use of technology increases.[71]

This all may seem simply a social problem. However, this view of privacy has implications for the Fourth Amendment when government and school officials utilize such information.

Law enforcement has long used social media in investigations, engaging in activity that could be considered government

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ceeding to upload such personal information of some customers who are minors violated the Children's Online Privacy Protection Act. Danielle Citron, *Boyden on Google Buzz and COPPA*, CONCURRING OPINIONS, Feb. 17, 2010. An additional example of privacy sharing includes the increasing popularity of "location sharing apps" used on cellular phones, which allow people to "broadcast their whereabouts through check-ins on their mobile devices and connect with others nearby." *NPR Marketplace Morning Report: Facebook Privacy* (NPR radio broadcast Mar. 18, 2010).

[70] *See, e.g.*, Rob Pegoraro, *Facebook Address-Sharing Retreat Provides Further Proof of Law of Unintended Consequences*, WASH. POST. (Jan. 18, 2011, 2:11 PM), http://voices.washingtonpost.com/fasterforward/2011/01/facebook_address-sharing_backt.html.

[71] PALFREY & GASSER, *supra* note 6, at 63-64. Moreover, the Pew Internet & American Life Project reports that concern should extend beyond public digital footprints because corporate databases routinely archive such information. MADDEN ET AL., *supra* note 7, at 2-3 (five most popular search engines routinely archive users search terms, computer's address and unique identifier for their web browser for 13-18 months). Others note that "[t]he networked and public nature of these practices makes the 'lessons' about social life . . . more consequential and persistent." ITO ET AL., *supra* note 6, at 14. Indeed, Twitter is donating its archive of all public "tweets" as well as providing regular updates to the Library of Congress. Randall Stross, *When History Is Compiled 140 Characters At A Time*, N.Y. TIMES, May 2, 2010, at B5.

monitoring.[72] A released Department of Justice document identifies the utility of social networking sites to "reveal personal communications[;] establish motives and personal relationships[;] provide information[;] prove and disprove alibis[;] and establish crime or criminal enterprise."[73] It further discusses the reasons to "go undercover" on such sites to include "communicate with suspects/targets[;] gain access to non-public info[;] [and] map social relationships and networks."[74] Furthermore, when a suspect is arrested carrying a cell phone, police often search it incident to the arrest.[75] Such a search often reveals considerable personal information about the possessor's previous whereabouts, conversations, and associations, all of which is information many people have previously considered private.

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[72] Griffin v. State, 995 A.2d 791 (Md. Ct. Spec. App. 2010) (police using MySpace posting as evidence of intimidation); Richard Lardner, *Break the Law and Your New "Friend" May Be the F.B.I.*, AP DATASTREAM, Mar. 16, 2010 (describing federal agents "logging on surreptitiously to exchange messages with suspects, identify target's friends or relatives and browse private information such as postings, personal photographs and video clips"); Ted Strong, *Nelson County Deputies Take Laptops for a Spin*, CHARLOTTESVILLE DAILY PROGRESS, July 4, 2010 (discussing use of social networking information as an investigative tool to track down information on suspects, locate evidence of a crime, and other activity); Tracy Gordon Fox, *Extra Eyes Watch Online, Police Look Over Kids' Shoulders*, HARTFORD COURANT, Oct. 29, 2006, at A1 (police arresting a high school sophomore after posting threatening messages on his MySpace account apparently aimed at "student body").

[73] Letter from Rena Y. Kim, Chief of Freedom of Info./Privacy Act Unit, Office of Enforcement Operation, to James Tucker, Elec. Frontier Found., Obtaining and Using Evidence from Social Networking Sites, *available at* http://www.eff.org/files/filenode/social_network/20100303__crim_socialnetworking.pdf. This document was released to the Electronic Frontier Foundation through a FOIA request and appears to be related to Federal Agent Training. Lardner, *supra* note 72 (locating a suspect through a Friend's profile). Campus and local police have used social media to identify and arrest criminals. Lindsey Reiser, *To Catch a Thief on Facebook – Campus Police Use Facebook to Identify Suspects*, ABC NEWS (Feb. 28, 2010), http://abcnews.go.com/print?id=9933416 (documenting campus and local police identifying and arresting suspects through reviewing social media). A recent state level training course entitled "Successful Use of Online Social Networking for Criminal Investigations and Intelligence" notes that

> [o]n-line social networking sites such as MySpace, Facebook are an untapped resource for many investigators. Gangs and other criminals use the Internet, particularly MySpace, Facebook and other social networking sites, to recruit new gang members, plan crimes, brag about their crimes, post pictures of themselves with their associates, steal identifying information from others and engage in other various types of illegal activity.

Successful Use of Online Social Networking for Criminal Investigations and Intelligence, PROJECT SAFE NEIGHBORHOODS (June 17, 2010), *available at* http://www.in.gov/ipac/June%2017%20Online%20social%20networking%20training.pdf.

[74] Letter from Rena Y. Kim to James Tucker, *supra* note 73.

Schools, in an attempt to fulfill their compelling interest in a safe school community and the maintenance of a learning environment, have recognized that students are using technology at times to negatively affect that environment. Officials understand and take advantage of this use to protect the environment. For example, some school-based law enforcement and school officials regularly access social networking sites of students for a variety of reasons. On the one hand, a youth having a school resource officer as a Friend or contact on his social network site is considered a deterrent to online victimization by adults. However, that "Friend" and law enforcement official now has access to all the information on the student's social networking site and possibly that of many of his contacts. Specifically regarding students, officials also access social networking sites to interdict and prevent youth crime, such as uncovering plans for a party where alcohol will be served or for a fight between rival groups prior to such occurrences.[76] Additionally, school resource officers can become aware of past crimes such as cyber-bullying or threats to school community.[77] However, such intrusions may allow government officials to examine deeply personal matters such as diaries, location of students, personal information, and images, all without either procedure or any level of suspicion.[78]

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[75] *See infra* p. 1064 and notes 136-38 and accompanying text.

[76] Fox, *supra* note 72 (discussing how much underage drinking is promoted on such social networking sites and documentation of such is later posted). The Boston Globe reported that of twenty-two police departments, fourteen utilize social networking sites for investigations, citing examples of locating missing teens, identifying a vandal who caused $70,000 worth of damage, review for underage drinking parties, and brewing fights in schools. Julie Masis, *Predators Beware: Face on MySpace May Be Police Decoy*, BOSTON GLOBE, Feb. 8, 2009, at R3.

[77] *See* Fox, *supra* note 72 and accompanying text. Michael Burnbaum, *The Profile Police,* WASH. POST, Apr. 6, 2009, at A1 (discussing police using social networking sites to "break up fights, monitor gangs, and thwart crime in what amounts to a new cyberbeat").

> In this fast-changing digital environment, expectations of privacy among young people are shifting. . . . Revised expectations of privacy may have an implication for protections that the Digital Native may receive under the law now and in the future.[79]

Therefore, the impact of this shift in privacy can be great.

II. THE REASONABLE EXPECTATION OF PRIVACY

A. Justice Harlan's Two-Pronged Test

Currently, the analysis of modern Fourth Amendment search doctrine begins with *Katz v. United States*,[80] in which the Supreme Court articulated a transition from a property and trespass concept of government searches to a privacy-based framework.[81] In *Katz,* law enforcement placed a recording device on the outside of a public telephone booth and surreptitiously recorded contents of Katz's conversations. The Court, departing from the previously used trespass analysis, rejected the parties' framing the legal issue as whether a public phone booth was a "constitutionally protected area."[82] Rather, the majority framed the legal issue as whether Katz knowingly exposed information to the public or attempted to keep said information private. Articulating the new privacy basis, the Court asserted that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected."[83] However, this arguably ambiguous majority opinion further stated that "the Fourth Amendment cannot be translated into a general constitutional 'right of privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusions, but its protections go further, and often have nothing to do with privacy at all."[84] Some scholars quite reasonably observed the ambiguity of the majority opinion.[85]

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[78] Burnbaum, *supra* note 77 (discussing chagrin of students who feel such monitoring is an invasion of privacy); Sarah Randag, *Police Use Social Networking to Target Underage Drinkers*, A.B.A. J., Nov. 25, 2009, http://www.abajournal.com/news/article/police_use_social_networking_to_target_underage_drinkers/.

[79] PALFREY & GASSER, *supra* note 6, at 54.

[80] 389 U.S. 347 (1967).

[81] *Id.* at 353.

[82] *Id.* at 351.

Seeking to clarify matters, Justice Harlan, concurring, coined his famous two-pronged analysis. According to Justice Harlan, the government engaged in a search when it examined an area in which a suspect had a "reasonable expectation of privacy."[86] When this occurs, a search warrant (absent an applicable exception) must be obtained. The reasonableness of the expectation is determined by analyzing the "two-fold requirement":

> [F]irst that a person [has] *exhibited* an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand conversations in the open would not be protected

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[83] *Id.* (citations omitted). For an excellent discussion of the opinions and precedents of *Katz* and *White*, see generally Catherine Hancock, *Warrants for Wearing a Wire: Fourth Amendment Privacy and Justice Harlan's Dissent in* United States v. White, 79 MISS. L.J. 35 (2009).

[84] *Katz*, 389 U.S. at 350; *see also* THOMAS CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 60 (2008) (noting that although Justice Stewart utilized the word "privacy," he was clear that both no general right of privacy exists and that he "explicitly refused to limit the protections afforded solely to a privacy analysis").

[85] Hancock, *supra* note 83, at 52 and *infra* note 111 and accompanying text (discussing the recognized and perhaps purposeful ambiguity of the majority opinion).

[86] Subsequent cases have interchanged the objective prong to include a "legitimate expectation of privacy" or a "justifiable expectation of privacy." *See, e.g.*, Illinois v. Andrews, 463 U.S. 765, 771 (legitimate); Smith v. Maryland, 442 U.S. 735, 740 (justifiable).

> against being overheard, for the expectation of privacy under the circumstances would be unreasonable.[87]

It is noteworthy that Justice Harlan's formula, unlike the *Katz* majority, *fully* embraced "privacy" as the definition of what the Fourth Amendment protects. In *Smith v. Maryland*, the Court linked the subjective prong of the two-pronged test with the majority's ambiguous privacy focus stating, "[t]he first [prong] is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' whether, in the words of the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private.'"[88] Thus, to invoke the protection of the Fourth Amendment, a person must first be able to demonstrate, *through his conduct*, that he sought to protect something as private. The implications of this requirement are particularly significant when considering youthful attitudes toward technology and information sharing.

B. The Court Has Expressed Concern with the Two-Pronged Test

Four short years after *Katz*, Justice Harlan[89] expressed concern about the application of his two-pronged test in his dissent in *United States v. White*. As Justice Blackmun later did in *Smith v. Maryland*,[90] he proposed an alternative to *Katz* when that test failed. In *White*, the police employed the use of an informant who wore a device that transmitted to government agents his conversations with White, which had occurred in the informant's home and car, White's home, and a restaurant.[91] At trial, the government could not locate the informant to testify, and the agents who conducted the surveillance testified as to the conversations.[92] In affirming admission of that evidence, the plurality opinion held that White had assumed a risk that the person in whom he confided was either not an informant, or an informant with a transmitter.[93] As such, the Court concluded that the agents had not violated any legitimate expectation of privacy when the informant transmitted and agents monitored the conversations.

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[87] *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (emphasis added).

[88] Smith v. Maryland, 442 U.S. 735, 740 (1979) (emphasis added) (quoting *Katz*, 389 U.S. at 361, 351) (citations omitted).

[89] United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

[90] *See infra* notes 105-10 and accompanying text.

[91] *White*, 401 U.S. at 745-47 (majority opinion).

[92] *Id.* at 747.

Harlan questioned this analysis.[94] In so doing, he challenged the plurality's position that there was no distinction between agents monitoring conversations and undercover informants participating in their conversations:

> The force of the contention [that there is no distinction] depends on the evaluation of two separable but intertwined assumptions: first, that there is no greater invasion of privacy in the third-party situation, and, second, that uncontrolled consensual surveillance in an electronic age is a tolerable technique of law enforcement, given the values and goals of our political system.[95]

Regarding the plurality's use of the reasonable expectation of privacy test, Justice Harlan questioned its utility and conceded its limitations. He acknowledged that the current approach "represent[s] an advance over the unsophisticated trespass analysis of the common law," but stressed that "*they too have their limitations* and can, ultimately, lead to the *substitution of words for analysis*. The analysis must, in [his] view, transcend the search for subjective expectations or legal attribution of assumptions of risk."[96]

This caution, that the analysis not become a rote application of words, seems to arise from an understanding that expectations of privacy are not just labels. He elaborated: "Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the *desirability of saddling them upon society*."[97] Therefore, Justice Harlan articulated that his approach in *Katz* may have "misconceived" the true concern of the Fourth Amendment by focusing incorrectly on the individual, rather than the impact of the practice on the whole of society.[98]

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[93] *Id.* at 752.

[94] First, he questioned the plurality's factual treatment equating the facts of *White*, which involved third party monitoring, with the facts of *Lewis* and *Hoffa*, which involved confidential informants relaying their conversations to law enforcement, or *Lopez*, which involved a recording device on a government agent. *Id.* at 784-85 (Harlan, J., dissenting).

[95] *Id.* at 785.

[96] *Id.* at 786 (emphasis added).

Justice Harlan then offered an alternative when the two-pronged test fails. The alternative is rooted in the Court engaging in a more fundamental analysis of "examining the desirability of saddling [such expectations] upon society."[99] His solution is more than just an objective test of what society will approve. Rather, for him "[t]he critical question, therefore, is whether under our system of government, as reflected in the Constitution, we *should* impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement."[100] Harlan proposed answering this question with a balancing test of "[1] assessing the nature of a particular practice and [2] the likely extent of its impact on the individual's sense of security [3] balanced against the utility of the conduct as a technique of law enforcement."[101]

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[97] *Id.* (emphasis added). Scholars today echo this notion of the need to examine more fundamental questions that an unreflective adherence to the reasonable expectation of privacy test allows. "[T]he phrase 'reasonable expectation of privacy' is essentially a legal fiction that masks a normative inquiry into whether a particular law enforcement technique should be regulated by the Fourth Amendment." Orin Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1037 (2010).

[98] *White*, 401 U.S. at 788 n.24 (Harlan, J., dissenting).

[99] *Id.* at 786.

[100] *Id.* (emphasis added). For a discussion on Harlan's "should" question, see Hancock, *supra* note 83, at 76-78. Hancock describes a series of Harlan opinions as "reflect[ing] the view that the *Katz* expectations concept was a vessel that could be filled with arguments that defined privacy based on artificial criteria resembling legal fictions of the *Olmstead* regime." *Id.* at 89.

[101] *White*, 401 U.S. at 786 (Harlan, J., dissenting). This focus on individual security hearkens back to early attempts by the Court to address the Fourth Amendment. For example, in *Boyd v. United States*, the Court found an order compelling the production of records violated the Fourth Amendment. The Court noted, "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . ." Boyd v. United States, 116 U.S. 616, 630 (1886).

For Justice Harlan, the question became not simply whether an individual had an expectation, but rather, whether the Court should impose upon the citizenry the risk to their security without Fourth Amendment protection. This analysis was invoked by Justices Marshall and Brennan in their dissent in *Smith* where Justice Marshall not only quoted Justice Harlan's discussion of "saddling" risks on society, but also challenged the assessment of risk approach by reminding that:

> [W]hether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in free and open society. By its terms, the constitutional prohibition of unreasonable searches and seizures assigns to the judiciary some prescriptive responsibility.[102]

While Justice Blackmun later acknowledged Justice Harlan's cautionary note in his *White* dissent, Justices Marshall and Brennan explicitly embraced Harlan's fundamental approach to "evaluate the 'intrinsic character' of investigative practices with reference to the basic values underlying the Fourth Amendment."[103]

A decade after *Katz*, in *Smith v. Maryland*,[104] Justice Blackmun writing for the majority sounded a similar caution. Justice Blackmun recognized situations in which the subjective expectations of privacy prong would not suffice, and also offered an alternative approach. *Smith* involved a case in which law enforcement requested that the telephone company install a device that recorded outgoing phone numbers dialed from Smith's home, but not the content of the ensuing conversations.[105] The Court upheld this warrantless procedure partly because it concluded that Smith had no reasonable expectation of privacy in the phone numbers dialed due to his awareness of the numbers' exposure to the phone company.[106] However, within this discussion, the Court recognized situations in which the two-pronged test would not be applicable. After discussing the two prongs, the Court stated that "[s]ituations can be imagined, of course, in which *Katz's* two-pronged inquiry would provide an inadequate index of Fourth Amendment protection."[107]

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[102] Smith v. Maryland, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting).

[103] *Id.* at 751.

[104] 442 U.S. 735 (1979).

[105] *Id.* at 737.

> For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, *individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects.* Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, *where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms,* those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper.[108]

Thus, the Court cautioned that the government could not limit privacy expectations merely by announcing its intent to spy on its citizens; if the government did so, the expectation-of-privacy test would be inadequate, and a "normative inquiry" would be necessary.[109] But in predicting potential threats to

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[106] *Id.* at 743.

[107] *Id.* at 741 n.5.

[108] *Id.* (emphasis added).

[109] The term "normative" can be somewhat ambiguous in that it is considered to have two meanings. First, it is defined as "[e]stablishing or conforming to a norm or standard." BLACK'S LAW DICTIONARY 1086 (8th ed. 2004). Second, it has also reflected, not a societal standard, but what most of society actually does do: "actual . . . standard determined by the typical or most frequent behavior." *Id.* Therefore, one meaning suggests an inquiry into an authoritative standard, while the other suggests an inquiry into the average or median standard of a group. Whichever was intended by Justice

privacy and Fourth Amendment protection, the Court did not envision what appears to be happening today—that a substantial segment of society would deliberately or unwittingly diminish its own right to privacy.

By and large, the Court has continued to apply Justice Harlan's two-pronged test in *Katz*.[110] However, the Court has also recognized flaws to this approach under certain circumstances or, in Justice Scalia's case, all circumstances.[111] When the test fails, Justice Blackmun counsels applying a strictly normative approach. Justice Harlan proposed a more fundamental inquiry into the nature of a practice, its impact on the individual's sense of security, and the utility of the practice.

C. In Public School Settings Students Have Limited Privacy Rights

Before addressing whether today's youths' subjective attitudes toward privacy have undermined their constitutional protections, it is worth reviewing how the Supreme Court has applied the Fourth Amendment to searches by public school officials.[112] While this line of cases is imperfect because it focuses on students, not youth more generally, it provides the clearest lens through which to examine the implications of the arguably distinct privacy expectations. The issue arises both in suspicion-based searches and suspicionless searches. In both

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Harlan, the question still remains: whose normative should be applied—all of society's or a subset class's normative? How should that normative be measured?

[110] *E.g.*, Bond v. United States, 529 U.S. 338 (2000); California v. Ciraolo, 476 U.S. 207 (1986); Smith v. Maryland, 442 U.S. 735 (1979).

[111] Justice Scalia has written that the *Katz* test established only "that, unsurprisingly those 'actual (subjective) expectations of privacy' that society is prepared to recognize as 'reasonable,' bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable. When that self-indulgent test is employed . . . to determine whether a 'search or seizure' within the meaning of the Constitution has occurred (as opposed to whether that 'search or seizure' is an 'unreasonable' one), it has no plausible foundation in the text of the Fourth Amendment." Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

[112] Since the Fourth Amendment protects against only government intrusions into privacy, Fourth Amendment issues arise in school settings only in public schools; searches by officials in private schools are not subject to Fourth Amendment standards or restrictions.

contexts the Court recognized that in a school setting, a school's need to maintain order and discipline, and preserve the learning environment necessarily diminishes a student's privacy rights.[113]

The Court first held that public school students are protected by the Fourth Amendment on school property in *New Jersey v. T.L.O.*[114] In *T.L.O.*, a school official searched T.L.O.'s purse, having suspected her of smoking on campus.[115] In this case, the Court concluded that the Fourth Amendment does apply to searches conducted by school officials.[116] However, while at school, students do not enjoy the same degree of protection as adults. As a rule, to search an adult, a public official must have probable cause to believe evidence of a crime will be found, and, often, must obtain a search warrant before conducting the search. In *T.L.O.*, the Court concluded that neither of these requirements applied in the public school setting.[117] The Court reasoned that the central requirement of the Fourth Amendment is that a search or seizure must be "reasonable."[118] Specifically, "what is reasonable depends on the context in which the search takes place."[119] In a public school context, that determination is made by "balancing the need to search against the invasion which the search entails."[120] For a school setting, the Court determined that balance was between the "substantial interest of teachers and administration maintaining discipline in the classroom and on school grounds" and the students' interest in privacy.[121] Not only was a warrant unnecessary, but the Court lowered the level of suspicion necessary for a search to be reasonable; probable cause was not required. Rather, a court must determine the reasonableness of a search with a two-fold inquiry. First, one must consider whether the action was "justified at its inception."[122] A search is "justified at its inception when there are *reasonable grounds* for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[123] Second, the search actually conducted must be "reasonably related in scope to the circumstances which justified the interference in the first place."[124] This standard is met when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[125]

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[113] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

[114] *Id.* at 325. When searching students, the doctrine of in loco parentis did not isolate officials from the Fourth Amendment because they act as representatives of the state. *Id.* at 336.

[115] *Id.* at 328.

[116] *Id.* at 333-34; *see supra* note 114 and accompanying text.

[117] 469 U.S. at 340-41 ("The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.").

[118] *Id.* at 337.

[119] *Id.*

[120] *Id.* (quoting Camara v. Mun. Court, 387 U.S. 523, 536-37 (1967)).

T.L.O., therefore, confirmed that, although the Fourth Amendment applies to students in a school search, students have limited privacy rights in a school setting. School officials are permitted to search students without probable cause or a warrant. They can do so if the search is based on a reasonable suspicion that it will produce evidence of violation of either a criminal law or school policy and it is not excessive in scope relating to the objective of the search and age or sex of the student. In *T.L.O.*, school officials had a reasonable suspicion that T.L.O. had cigarettes in her purse and, therefore, looked through it. The Court upheld this action as reasonable.[126]

This conceptualization of students as a group who possess decreased rights is apparent in the suspicionless search cases as well. In 1995 and again in 2002, the Court held that where school officials could demonstrate that a significant drug problem existed within a school or a district and that less intrusive measures had not or would be unlikely to address the problem, it was reasonable to mandate that students could not participate in extracurricular activities unless the student and parents agreed that some participants would be required to submit urine samples for drug testing, under conditions that adequately protected the student's privacy and rigorously controlled information concerning test results.[127] The Court explicitly articulated that "the legitimacy of certain privacy expectations . . . may depend upon the individual's legal relationship with the state."[128] Students in their "legal relationship with the state" stand with a decreased expectation of privacy that is considered with the level of intrusion and balanced against the severity of the need for school officials to search.[129]

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[121] *Id.* at 339-40. "[W]e have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures." *Id.* (citing Goss v. Lopez, 419 U.S. 565, 582-83 (1975)).

[122] *Id.* at 342 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

[123] *Id.* (emphasis added).

[124] *Id.* at 341.

[125] *Id.* at 342.

[126] *Id.* at 343-44 (validating a subsequent student search for cigarettes based on the reasonableness of the original search).

The Court next considered a suspicion-based search of a public school student in 2010, in *Safford Unified School District #1 v. Redding*, where it departed from previous cases and ruled in favor of the student. In *Redding*, school officials had received information that students were bringing prescription medication to school for recreational consumption.[130] The school had previously had a student hospitalized for such abuse.[131] Information linked the petitioner as a possible source of pills found on school grounds.[132] As a result, school officials not only searched the petitioner's belongings, but subjected her to an unconstitutional "strip search."[133] An 8-1 majority held that, even assuming school officials had reasonable suspicion to believe that a middle school girl possessed prescription strength and over-the-counter medication, forcing her to submit to a search only slightly less intrusive than a strip search was an excessive intrusion into her privacy.[134]

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[127] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653-54 (1995); Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

[128] *Vernonia Sch. Dist.*, 515 U.S. at 654 (upholding random drug testing procedure for student athletes under the special needs exception to the warrant requirement).

[129] *Id.* at 657.

[130] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2640 (2009).

[131] *Id.* at 2648. (Thomas, J., concurring in part and dissenting in part).

[132] *Id.* at 2640 (majority opinion).

[133] *Id.* at 2642-43.

While the Court announced no change in the standard, the opinion offers some guidance regarding the Court's conceptualization of students as a group and their expectations. First, the Court indicated that a search has "reasonable grounds" if there is a "*moderate chance* of finding evidence of wrongdoing."[135] This terminology of "moderate chance" appears to be an attempt to more precisely describe the "reasonable grounds" standard rather than to change the standard. Second, the Court stated that Redding did have a reasonable expectation of privacy in the personal items she carried in her backpack.[136] This is not insignificant, particularly given how many youths carry among their personal items cell phones or other mobile electronic devices capable of storing and accessing nearly unlimited amounts of personal information.[137] Third, the Court said that the strip search was an invasion of the girl's subjective expectation of privacy, in part because it was "inherent in her account . . . as embarrassing, frightening and humiliating."[138] Therefore, the intrusiveness of a search can be measured in part by the level of embarrassment and humiliation caused. Fourth, the Court clearly conceptualized students as a group. Although *Redding* involved a suspicion-based search of one student, the Court drew at least one conclusion from her status as a student. The Court noted that "[t]he reasonableness of her expectation . . . is indicated by the consistent experiences of other young people similarly searched whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."[139] Granted, the reasonableness of the expectation against a near-strip search is easier to defend than the same expectation against a search of a cell phone. However, the Court's emphasis on the reasonable expectations of school children generally, as a distinct class with "adolescent vulnerability," provides a useful perspective in evaluating the degree to which reasonable expectations of privacy exist, and therefore, the justification school officials should be required to demonstrate when invading them. Finally, *Redding* underscores a qualifying statement the Court made in *T.L.O.* which, until *Redding*, was at times overlooked—that in measuring reasonableness, a court must consider the "age and sex" of the student.[140] This aspect of the test combined with (1) the fact that students possess a reasonable expectation of privacy in personal possessions, and (2) that the emotions experienced by the subject youth and the "consistent experience" of similarly situated youth combine to create an interesting result. One now has room to argue that the two-pronged *Katz* test can be viewed through a lens of the unique characteristics and common experience of students and youth as a group. As such, the privacy norms of the group are relevant and may derail the *Katz* test.

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[134] *Id.* at 2643-44 (a strip search of a student violated the Constitution, but school officials were entitled to qualified immunity). Previous school-search cases held in favor of the school. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 838 (2002) (deeming constitutional a school policy that requires all students who participate in any extracurricular activity to undergo drug testing because the policy "is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren"); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) (holding school's policy, conditioning that student athletes participating in sports consent to random drug testing, constitutional under Fourth Amendment inquiry); New Jersey v. T.L.O., 469 U.S. 325, 343-44 (1985) (validating a subsequent student search for drugs based on the reasonableness of the original search).

[135] *Redding*, 129 S. Ct. at 2639 (emphasis added).

[136] *Id.* at 2641 n.3.

[137] *See supra* part I.A.

[138] *Redding*, 129 S. Ct. at 2641.

D. The Court Has Recognized the Role that Technology Can Play in Reshaping Expectations of Privacy

As background to examining the hypothetical question posed in this title, this article has reviewed the *Katz* test, the Court's expressed reservations of the *Katz* test, and the Court's articulations regarding students and their privacy. We now turn to an analysis of the Court's statements regarding technology and the Fourth Amendment. The intermingling of expectations of privacy and technology has a long history. In their historic 1890 piece, *The Right of Privacy*, Samuel Warren and

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[139] *Id.*

[140] New Jersey v. T.L.O. 469 U.S. 325, 342 (1985).

Louis Brandeis recognized that the basic concept of the right to privacy was dynamic, and technology affected that right: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society."[141] They too expressed concern about technology, a.k.a., "modern enterprise and invention," which can increase the invasion on one's privacy subjecting its members "to mental pain and distress."[142]

Technology affects privacy not only with regard to its use by the government to surveil individuals, but also in the way individuals use it in their daily lives. The Court has referenced technology to both increase Fourth Amendment freedoms and, more often, to restrict them. One reason the *Katz* Court abandoned its trespass analysis and embraced recognition of the need to protect "intangible" conversations was the increased importance of the telephone in daily life.[143] In *Katz* that recognition contributed to the Court finding a reasonable expectation of privacy. In contrast, twenty years later, in *California v. Ciraolo,*[144] the Court cited public use of technological advances to justify denying reasonable expectation of privacy in a defendant's yard:

> In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.[145]

The Court, therefore, held that the flight, which was deliberately undertaken to look into the suspect's backyard, was not a "search" at all. In essence the Court equated targeted aerial surveillance over someone's home (and, later, in *Riley v.*

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[141] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[142] *Id.* at 196.

[143] Katz v. United States, 389 U.S. 347, 352 (1967) ("To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.").

[144] California v. Ciraolo, 476 U.S. 207, 215 (1986).

[145] *Id.* at 215.

Florida, a helicopter flight from 400 feet over a barn surrounded by fences posted with "no trespass" signs) with seeing into someone's yard from a public sidewalk.[146] These cases support the implication that when social custom and technology make conceptualizing privacy problematic,[147] the Fourth Amendment no longer affords any protection from government use of that technology targeted at a specific location.[148]

On the same day as *Ciraolo*, the Court recognized in *Dow Chemical Co. v. United States* that modern technology may make aerial observation of curtilage invasive when it discloses intimate associations otherwise imperceptible to police.[149] "In common with much else, the technology of photography has changed in this century. These developments have enhanced industrial process and indeed all areas of life; they have also enhanced law enforcement techniques."[150] The Court later stated in *Kyllo v. United States* that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[151]

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[146] *Id.* at 213; Florida v. Riley, 488 U.S. 445 (1989).

[147] *Ciraolo*, 476 U.S. at 215. The majority ignored the minimal likelihood that someone might randomly fly over Ciraolo's yard at 1,000 feet, would happen to look down, recognize marijuana cultivation, figure out whose house it was, and report the matter to the police. *Id.* at 223-24 (Powell, J., dissenting).

[148] In its more recent case of direct use of technology for monitoring, the Court discussed the use of thermal imaging technology to monitor suspects within the home. Kyllo v. United States, 533 U.S. 27, 29-30 (2001). The opinion written by Justice Scalia, a critic of the reasonable expectation of privacy analysis, did not analyze the technology within that framework. *Id.* at 39. Rather, the Court noted that when the government "uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without a physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40.

[149] *Ciraolo*, 476 U.S. at 215 n.3; Dow Chem. Co. v. United States, 476 U.S. 227 (1986).

[150] *Dow Chemical*, 476 U.S. at 231.

[151] *Kyllo*, 533 U.S. at 33-34. Justice Scalia frames the question presented to the Court in *Kyllo* as "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." *Id.* at 34. Justice Brandeis previously articulated such concerns noting that "[d]iscovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Olmstead v. United States 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

This approach has clear implications with regard to youths and their mobile devices. A school official or prosecutor might argue by analogy that although a diary was once considered the most personal of documents, now with so many young people keeping online diaries, shared with dozens or hundreds of readers, government perusal of such should be considered the equivalent of the overflights in *Ciraolo* and *Riley*, i.e., not an intrusion into privacy at all.[152]

In 2010 the Court declined the opportunity to rule broadly on the reasonable expectation of privacy in text messages[153] on an employee's work-issued alphanumeric pager.[154] In declining, the Court recognized the dynamic world of technology, noting it should "proceed with care" in part because "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology use before its role in society has become clear."[155] The Court recognized not only the dynamism in the technology itself, but also in social norms: "Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior."[156]

The Court is not alone in struggling to reconcile technological changes and the Fourth Amendment. Scholars have particularly identified the need to adjust the traditional Fourth Amendment analysis for the Internet and cyberspace.[157] Professor Kerr, for example, assumes a goal of "technology neutrality," i.e., "the degree of privacy the Fourth Amendment extends to the Internet should try to match the degree of privacy protection that the Fourth Amendment provides the physical world."[158] In so doing he analogizes the distinction in traditional Fourth Amendment analysis of what is inside or outside containers to what is content and non-content in Internet communication, arguing for protection of content in Internet communications.[159] Particularly with the Internet, Kerr criticizes the use of the reasonable expectation of privacy test as failing to "mirror widely shared social expectations."[160] He concludes that when the Court identifies a law enforcement practice it feels should be regulated, it announces that there is a reasonable expectation of privacy, and when the practice need not be regulated, it announces that there is no expectation. Consequently, "asking what privacy most Internet users expect does not accurately represent the *Katz* test."[161] Furthermore, with regard to the rapidly changing technology today, courts likely should not yet choose from emerging social attitudes.

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[152] LENHART ET AL., note 5, at i-ii, 7.

[153] Text messages are messages in plain text sent through various devices both wired and wireless. The most common implementation of text messaging is short message service ("SMS"). This is how short messages can be sent to and from handheld wireless devices including phones. NEWTON, *supra* note 4, at 1116.

[154] City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (presenting the question of the expectation of privacy of both (1) the employee in his messages sent and received, and (2) third parties in their messages sent to the employee's pager).

[155] *Id.* at 2629.

[156] *Id.* In the context of the specific issue of *Quon,* the Court noted that "[a]t present, it is uncertain how workplace norms, and the law's treatment of them, will evolve." *Id.* at 2630.

[157] *See, e.g.*, Kerr, *supra* note 97; Adam Gershowitz, *The iPhone meets the Fourth Amendment*, 56 UCLA L. REV. 27 (2008); Morgan Cloud, *The Effect of Technology on Fourth Amendment Analysis and Individual Rights*, 72 MISS. L.J. 5 (2002).

Electronic communication technology in mobile media devices such as the smartphone,[162] iPhone, PDA,[163] and laptop computer raise particular concerns about the traditional test. For example, some acknowledge how current Fourth Amendment law could allow access to volumes of information through searches of cellular telephones and suggest altering legal rules to limit such searches.[164] Professor Cloud characterized the use of the two-part test as a failure when it comes to technology because the subjective prong has become irrelevant to the Court.[165] He advocates for a new value-based theory of Fourth Amendment protection with an approach emphasizing the technological equivalent of physical trespass triggering Fourth Amendment protections.[166] All these solutions speak to the problem of linking the Fourth Amendment to current technologies, as the technologies rapidly change and courts cannot uniformly remain informed of and in agreement with analogies.[167]

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[158] Kerr, *supra* note 97, at 1007.

[159] *Id.* at 1009-12.

[160] *Id.* at 1037.

[161] *Id.* at 1037-39.

[162] A smartphone is a

> cellular telephone with built-in applications and Internet access. Smartphones provide digital voice service as well as any combination of text messaging, e-mail, Web browsing, still camera, video camera, MP3 player, video player, television and organizer. In addition to their built-in functions, smartphones have become application delivery platforms, turning the once single-minded cellphone into a mobile computer.

PC Magazine Encyclopedia, PCMAG.COM, http://www.pcmag.com/encyclopedia_term/0%2C2542%2Ct%3DSmartphone&i%3D51537%2C00.asp (last visited Nov. 8, 2010).

[163] Otherwise known as a personal digital assistant, a PDA is

> [a] handheld computer for managing contacts, appointments and tasks. It typically includes a name and address database, calendar, to-do list and note taker, which are the functions in a personal information manager. Wireless PDAs may also offer e-mail and Web browsing, and data are synchronized between the PDA and desktop computer via USB or wireless. If the PDA includes a phone, it falls into the smartphone category.

The current state of the Court's approach to what the Fourth Amendment protects, at least outside the home, can perhaps be summarized as follows. First, under this traditional analysis a suspect must demonstrate by his actions a subjective expectation of privacy and such an expectation must be one that society is willing to endorse.[168] Second, students have decreased privacy rights and the characteristics of their behavioral norms are relevant. Third, although the *Katz* test was

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PC Magazine Encyclopedia, PCMAG.COM, http://www.pcmag.com/encyclopedia_term/0,2542,t=PDA&i=49021,00.asp (last visited Nov. 8, 2010).

[164] Gershowitz, *supra* note 157, at 27. In this piece, Gershowitz explores the options of changing nothing; limiting searches incident to arrests to searches for evidence of the crime of arrest; encouraging state legislatures to adopt more narrow statutes than the rule in United States v. Robinson, 978 F.2d 1554 (10th Cir. 1992), which allows the search of all personal items on arrest; limiting searches incident to arrest to only five steps of intrusion; or distinguishing between information on a phone and outside it. *Id.* at 45-57.

[165] Cloud, *supra* note 157, at 28-29.

[166] *Id.* at 44.

[167] *E.g.,* United States v. Bermudez, No. IP 05-43-CR-B/F, 2006 WL 3197181, at *13 (S.D. Ind. June 30, 2006) (rejecting a *Kyllo* challenge to using electronic devices to locate cell phones because cell phones are used to transmit signals to parties outside the home and thus their signals are "knowingly exposed to third part[ies], to wit, the cell phone compan[ies]), *aff'd sub nom.* United States v. Amaral-Estrada, 509 F.3d 820 (7th Cir. 2007).

[168] *See supra* note 87 and accompanying text.

first created to enhance privacy, as technology advances it has almost always resulted in a minimizing of privacy expectations.

Applying the *Katz* approach to the emerging generation of digital natives poses enormous problems. The problems derive from many factors: technology itself, their youth, actions of corporations controlling the technology, and the lack of judgment common in adolescents.[169] Research demonstrates that digital natives engage in somewhat risky behavior online and have a false perception of privacy.[170] The lack of complete development of teenagers' prefrontal cortex impedes their ability to evaluate risks and resist them.[171] Therefore, they may not manifest a subjective expectation of privacy similar to adults.

This failure to demonstrate a subjective expectation of privacy (at least one that society will recognize) may combine with decreased privacy rights of at least public school students to essentially create a "perfect storm" where under a traditional analysis, youths' expectation of privacy is compromised. Thus, the law may force an unforeseen scenario: the inapplicability of the *Katz* test to a class of society, not through government action, but citizen abandonment and corporate conditioning.

It is to this problem the article now turns. It is worrisome that the Court would allow an entire class of citizenry fewer Fourth Amendment protections based on the social norms of their behavior when those norms are just that—normal for their population. This is particularly troubling when that segment of the population has been recognized as less equipped to appreciate privacy implications of their conduct and, therefore, perhaps more in need of a judicial buffer between them and the state. On the other hand, given that many youths arguably seem to act differently about traditional privacy online, how can the law plausibly rule that they nevertheless have a reasonable expectation of it? The *Katz* test, therefore, may have less utility than ever before.

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[169] The Court has recognized, albeit in a very different context, that in particular, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); *see also* Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (juveniles' lack of maturity makes them less deserving of severe punishment of death penalty).

[170] PALFREY & GASSER, *supra* note 6, at 166; Grimmelmann, *supra* note 28; Seounmi Youn, *Teenagers, Perceptions of Online Privacy and Coping Behaviors: A Risk-Benefit Appraised Approach*, 49 J. BROADCASTING & ELEC. MEDIA 86 (2005).

[171] PALFREY & GASSER, *supra* note 6, at 166; Grimmelmann, *supra* note 28, at 1179-80 ("Later regret about initial openness is an especially serious problem for the most active social network site users: young people."); LIVINGSTONE & BOBER, *supra* note 2, at 15-16; *see also, e.g.*, JONES & FOX, *supra* note 14; LENHART ET AL., *supra* note 5, at 2; MCQUADE & SAMPAT, *supra* note 23, at 28-32.

III. WHAT IF SAVANA REDDING HAD A CELL PHONE? – EXPLORING KATZ AND KATZ ALTERNATIVES.

Beginning with Justice Harlan's dissent in *White,* through Justice Blackmun's opinion in *Smith* and culminating in the majority opinion in *Kyllo*, the Court has shown that the reasonable expectation of privacy test is limited. Given that youth as a group may have a fundamentally different understanding of privacy than older generations, the question becomes whether we have reached a point where their "subjective expectations have become 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms" such that the analysis fails.[172] If so, what then the response? Several possibilities exist. First, a traditional analysis could be applied resulting in either a forced conclusion affording some rights to youth in spite of reality or a stripping of privacy protections for this large segment of society. These results are hardly desirous. Second, Justice Blackmun's suggestion of a normative analysis could be followed. Third, Justice Harlan's alternative test articulated in *White* could be embraced.[173] Each of these approaches has flaws, which will be explored by applying them to an amended factual premise of *Redding*, the Court's most recent school search case.

A. Factual Scenario

The hypothetical providing the vehicle through which to examine these issues will be those of *Redding*, with some modifications to reflect current practices of school searches and cell phone policies. Here, this hypothetical assumes the school not only has a policy strictly prohibiting the nonmedical use, possession, or sale of any drug on school grounds, including "'[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted.'"[174] The hypothetical also assumes the school has a policy, common among school systems, prohibiting cell phone use at school, advising that such phones will be confiscated if displayed on campus.[175]

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[172] Smith v. Maryland, 442 U.S. 735, 741 n.5 (1979).

[173] A fourth approach is possible in which an entirely new test for technology be developed. Such a test is unwise in that tying laws to rapidly changing technology results in quickly obsolete laws.

In this hypothetical, one week before the search a student, J.R., reported to the school's vice principal that other students were bringing prescription drugs to recreationally consume at school.[176] He further reported he had previously taken such a pill from his classmate, which made him ill.[177] This school has a previous history of prescription medication abuse resulting in at least one hospitalization.[178]

On the day of the search, J.R. gave school officials a pill of prescription strength ibuprofen (400mg), which he claimed he received from M.G.[179] He further claimed that students were planning to consume the pills at lunch.[180] Officials removed M.G. from class. A day planner within M.G.'s reach was also removed, which contained additional contraband including several knives, lighters, a permanent marker, and a cigarette.[181] A razor blade, several white pills, and one blue pill (later identified as naproxen, an over-the-counter medication) were located within M.G.'s possession.[182] M.G. denied knowledge of the day planner but identified Susie Student (S.S.) as the source of the pills.[183] Others confirmed that S.S. and M.G. were friendly. J.R. identified S.S. as a student in whose house he had consumed alcohol prior to a school dance.[184]

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[174] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2640 (2009).

[175] *E.g.*, Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622 (E.D. Pa. 2006) (seizure of cell phone permissible as possession of phone on campus violated school policy, but search was impermissible); Koch v. Adams, 2010 Ark. 131 (2010) (where school district had policy of seizing cell phones for two weeks for possessing cell phone in classroom); *see also* STUDENT DISCIPLINE LAW BULLETIN (West, 2010) (discussing an Ohio school policy of phone confiscation if student violates ban of phone-use on campus).

[176] *Redding*, 129 S. Ct. at 2640.

[177] *Id.*

[178] *Id.* at 2648 (Thomas, J., concurring in part and dissenting in part).

[179] *Id.* at 2640 (majority opinion).

[180] *Id.*

[181] *Id.* at 2638, 2640.

[182] *Id.* at 2640.

The vice principal removed S.S. from her class and confronted her with the day planner and its contents. S.S. admitted ownership of the planner, but said she had lent it to M.G. a few days earlier.[185] She denied ownership of any of the pills, all of which violated school policy.[186] S.S. denied the vice principal's accusation that she was going to distribute pills in school. Officials searched her backpack and found nothing.[187]

Unlike the actual facts of *Redding,* assume S.S. had a smartphone hooked onto her backpack that buzzed (indicating incoming calls or texts) throughout her meeting with the vice principal with increased frequency as the lunch hour approached. Given the information regarding the possible distribution of pills at lunch, assume the vice principal took the smartphone and (1) looked through the recent calls to determine if M.G. or other students (potential drug purchasers) were trying to contact her; (2) examined her contacts list on her phone to determine shared contacts with M.G. or J.R.; (3) reviewed recent texts to see if there were any drug related messages; and (4) pressed one button on the screen and accessed her social networking account to determine if there were any postings or messages as to the lunchtime drug consumption.

B. Options for Examining the School's Actions

1. Traditional Analysis is Unsatisfying

The proposed hypothetical includes many separate wrinkles that highlight some additional inadequacies of the *Katz* analysis in this situation. Not only are there issues surrounding youth, but also surrounding the scope and ability of the reasonable expectation of privacy to be viable in a digital age.[188]

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[183] *Id.*

[184] *Id.* at 2641.

[185] *Id.*

[186] *Id.* at 2638, 2641.

[187] *Id.* at 2641. The Supreme Court found sufficient suspicion to justify the search of the backpack. *Id.* at n.3.

a. Applicability of the Fourth Amendment

As a threshold matter, the inquiry must begin by determining whether the Fourth Amendment applies at all, i.e., whether examination of the phone, accessing the call log, accessing the contacts, and accessing the social networking site were examinations into areas where a reasonable expectation of privacy existed. Such an inquiry is fact-driven and done on a case-by-case basis.[189] A superficial application may find that there is indeed a search. Significantly, the *Redding* Court concluded that the student had an expectation of privacy in her backpack as a personal container.[190] Therefore, the argument would proceed, S.S. surely has such an expectation in her phone as a personal container and, the government's examination of it constituted a search. As will be discussed below, although the cell phone search cases are split as to the reasonableness of the searches, almost all of these cases have found that the expectation of privacy in the phone exists.[191]

However, a more in-depth analysis indicates that whether one has a reasonable expectation of privacy in one's phone or text messages is far from clear. The Court did not resolve this in *Quon*.[192] Among the issues in *Quon* was whether a government employee had a reasonable expectation of privacy in texts (both sent and received) on his government-issued alphanumeric pager.[193] An additional question was whether those who sent him such messages also possessed an expectation that they were private.[194] The Court opted not to address these questions, and decided the case on the narrow grounds that the examination of the messages was reasonable. In so doing the Court explicitly stated it was too early to understand the privacy expectations in text messages, not only because of the technology's effect on shaping privacy expectations, but also "the degree to which society will be prepared to recognize those expectations as reasonable."[195]

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[188] Kerr, *supra* note 97, at 1012-15 (noting that one important difference between the physical and digital world is that the physical environment "limits the scale and location of evidence" but the digital environments normally do not).

[189] United States v. Chadwick, 433 U.S. 1, 23 (1977) ("small variations in the facts are determinative of the legal outcome"); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 178 (1972) ("[H]ere, as in nearly every case, facts are important.").

[190] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2641 n.3 (2009).

[191] *See, e.g.*, Connecticut v. Boyd, 992 A.2d 1071, 1079 (Conn. 2010) (defendant had reasonable expectation of privacy in cell phone, but search permissible under automobile exception). *Compare* United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007) (implying a reasonable expectation of privacy but upholding search of cell phone incident to arrest by treating the phone as a container), *with* Ohio v. Smith, 920 N.E.2d 949, 955 (Ohio 2009) (reasonable expectation of privacy in cell phone violated by invalid search incident to arrest).

[192] City of Ontario v. Quon, 130 S. Ct. 2619, 2629-30 (2010).

This lack of clarity is apparent in cases that have addressed cell phone searches. While there are few published decisions regarding searching cell phones on school property, much less searches of smartphones, there have been analyses of warrantless phone searches in other capacities, the most common of which are cases dealing with the searching of cell phones incident to arrest or consistent with other exceptions to the warrant requirement.[196] Courts are split on this issue and the fault line in this division depends on the court's conceptualization of the cell phone. Those courts that consider phones as containers capable of holding other containers generally allow the searches. Those that consider phones items that themselves access vast personal information do not.[197]

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[193] *Id.* at 2630-31.

[194] *Id.* at 2629-30.

[195] *Id.* at 2630-31. After *Quon*, the Court of Appeals for the 11th Circuit ruled that federal law has not clearly established a reasonable expectation of privacy in emails sent through a third-party Internet service provider. Rehberg v. Paulk, 611 F.3d 828 (11th Cir. 2010).

[196] It should be noted that many cases discussing searches of cell phones incident to arrest predate or omit the relevance of *Arizona v. Gant*, 129 S. Ct. 1710 (2009), in which the Court limited the search of a vehicle incident to arrest, and perhaps all searches incident to arrests, to searches for evidence of the crime of arrest or for officer safety. *See* State v. Smith, 920 N.E.2d 949, 952 (Ohio 2009) ("[W]hen the interests in officer safety and evidence preservation are minimized, the court has held that this exception no longer applies."); United States v. Wall, No. 08-60016-CR, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008) (same). Of course, courts have analyzed cell phone searches in contexts other than incident to arrest. *See* Connecticut v. Boyd, 992 A.2d 1071, 1076 (Conn. 2010) (search of incoming numbers on cell phone valid under automobile exception to warrant requirement); People v. Chho, 2010 WL 1952659, at *4 (Cal. Ct. App. May 17, 2010) (same); Lemons v. Texas, 298 S.W.3d 658, 662 (2009) (approving search of phone photos based on consent suggested when defendant handed phone to officers after their request "to see the phone" and concluding neither *Park* nor *Finley* applied); *Wall*, 2008 WL at *4 (rejecting government arguments of exigency or inventory search in addition to rejecting search incident to arrest argument); United

A leading case for a conception of cell phones as merely containers, and one of few circuit court decisions on this issue, is *United States v. Finley*.[198] In *Finley* the police searched the defendant's work-issued cell phone incident to his narcotics arrest, examining his phone, call log, and text messages.[199] The court found nothing special about the fact that the item examined was a cell phone and treated it as a container on one's person and, therefore, searchable without any additional justification at arrest.[200] In the early cell phone cases, many courts followed suit.[201]

States v. James, No. 1:06CR134 CDP, 2008 WL 1925032, at *4 (E.D. Mo. Apr. 28, 2008) (allowing search of cell phone under the automobile exception, but rejecting arguments based on consent and exigent circumstances); New York v. McGee, No. 2006NY047717, 2007 WL 1947624, at *6 (N.Y. Crim. Ct. June 29, 2007) (rejecting search of photos on phone based on inventory search).

[197] For a discussion of these differing conceptualizations of some electronic devices as containers or not, see U.S. DEPT. OF JUSTICE, COMPUTER CRIME & INTELLECTUAL PROPERTY SECTION, SEARCHING & SEIZING COMPUTERS AND OBTAINING EVIDENCE IN CRIMINAL INVESTIGATIONS 3-4, 33 (2009).

[198] United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007) (upholding search of cell phone as incident to arrest). The same circuit later rejected a search of a cell phone incident to arrest because the arrest was not valid. United States v. Zavala, 541 F.3d 562, 575-76 (5th Cir. 2008). *Zavala* has language differing from *Finley* and its conceptualization of the cell phone. *Zavala* recognized that "cell phones contain a wealth of private information including emails, text messages, call histories, address books, and subscriber numbers," calling them "similar to a personal computer that is carried on one's person." *Id.* at 577. The Court of Appeals for the Fourth Circuit followed *Finley*. United States v Murphy, 552 F.3d 405, 413 (4th Cir. 2009) (affirming denial of motion to suppress evidence from cell phone).

[199] *Finley*, 477 F.3d at 254.

[200] *Id.* at 259-60.

[201] *E.g.*, United States v. Deans, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008); United States v. Valdez, No. 06-CR-336, 2008 WL 360548, at *3 (E.D. Wis. Feb. 8, 2008) (although agreeing with Finley, noting the privacy concerns articulated in United States v. Park, No. CR 05-375 SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007), were not implicated because the officer limited his search to call history and did not search voicemails or text messages); United States v. Dennis, No. 07-008-DLB, 2007 WL 3400500, at *7 (E.D. Ky. Nov. 13, 2007) (upholding search of cell phone history log as consistent with *Finley*); United States v. Mercado-Nava, 486 F. Supp. 2d 1271, 1277-79 (D. Kan. 2007)

At the same time another view of cell phones emerged, articulated first in the unpublished opinion of the Northern District of California in *U.S. v. Park*.[202] Factually, *Park* was not the strongest case for the government in that the police could not recall when they searched the cell phone's address book.[203] In rejecting that this was a search incident to arrest because it was not contemporaneous to arrest, the district court articulated a view of the cell phone as distinct from an ordinary container:

> [M]odern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones and can record their most private thoughts and conversations . . . through email, and text, voice, and instant messages.[204]

This conceptualization of the cell phone has more recently been shared by many courts who favor this understanding of the cell phone as potentially highly personal.[205] One of the clearest discussions of this issue was made in *Ohio v. Smith*, where the Ohio Supreme Court analyzed the court split, con-

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(upholding search of cell phone that involved the downloading of memory and the accessing of stored numbers).

[202] *Park*, 2007 WL 1521573.

[203] *Id.* at *3 (police agreed that phone was searched at least at the time of inventory).

[204] *Id.* at *8; *see also* Gershowitz, *supra* note 157, at 29 ("[T]he iPhone is a handheld wireless device that functions as a cell phone, BlackBerry, camera, music player, and video player, while simultaneously providing Internet access."). Gershowitz argues that the iPhone changes everything because of its capability of storing tremendously more information, as well as its ability to access additional information. *Id.* at 41-42.

[205] *E.g.*, State v. Smith, 920 N.E.2d 949, 953 (Ohio 2009) (rejecting *Finley* and embracing *Park* in a search based on those particular facts); United States v. Quintanua, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009) (citing to *Zavala* and rejecting search of photographs on phone as not justified under the dual rationale of officer safety and evidence preservation); United States v. Wall, No. 08-60016-CR, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008) (Court "declines to adopt the reasoning of *Finley*" and the analogy between pagers and cell phones in which evidence of incoming phone numbers could be lost if not immediately preserved, in favor of a *Park* analysis).

cluding that courts that treated cell phones like containers were immersed in old, outdated technology.[206] The Ohio Supreme Court further acknowledged this tension between treating cell phones as small computers or as ordinary containers: "Given their unique nature as multifunctional tools, cell phones defy easy categorization. . . . Their ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher privacy in the information they contain."[207] This court recognized the "continuing rapid advancements in cell phone technology" in smartphones and their capability to both store large amounts of data as well as access the Internet.[208] In so doing, this court also rejected any requirement that officers discern the capability of cell phones before acting.[209] Notably, a four justice dissent rejected this analysis and embraced the concept of the two circuit court opinions in *Finley* and *Murphy*[210] that applied traditional Fourth Amendment principles asserting that a cell phone's digital address book is akin to traditional address books carried on the person.[211]

Notwithstanding these differing conceptions of cell phones in the case law, a shared recognition emerges from the cases: all cell phone searches are not equal. It is highly relevant exactly what the police examine on the phone. It matters if the police simply review the address book located on the phone, or access photos, text messages, or the Internet. In this hypothetical, S.S.'s expectations of privacy may vary between the numbers that appear on the screen during incoming calls and a password protected social networking site not actually located on the phone.[212]

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[206] *Smith*, 920 N.E.2d at 954.

[207] *Id.* at 955.

[208] *Id.* at 954.

[209] *Id.; see also* United States v. Murphy, 552 F.3d 405, 412 (4th Cir. 2009).

[210] *Murphy*, 552 F.3d at 412 (4th Cir. 2009) (affirming denial of motion to suppress evidence from cell phone).

[211] *Smith*, 920 N.E.2d at 957. (Cupp, J., dissenting).

[212] Drawing a legal distinction between information physically located on or off the cell phone is likely an unwise choice, given that technology seems to be moving in the direction of "cloud" computing. With cloud computing, the actual data is physically located in a remote location and the device simply provides access to information stored

To further complicate matters, the conceptualization of the cell phone is anything but static. For example, even if one were to embrace a *Park* analysis that phones are special due to their ability to hold vast data, as technology has advanced, the ability to remove this data from phones may allow for police to search them due to this new exigency.[213] Technological advances create new exigencies. The Computer Crime & Intellectual Property Section of the United States Department of Justice (CCIPS) and some courts have cited the ability of some phones to receive "a kill command . . . that will cause the device to encrypt itself or overwrite data stored on the device."[214] However, the fact that this technology exists surely cannot always create an exigency.[215] On the other hand, what burden will be on law enforcement to determine whether this remote

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on a remote server. Shari Claire Lewis, *Cloud Computing Brings New Legal Challenges*, LAW.COM (July 8, 2009), http://www.law.com/jsp/article.jsp?id=1202432062900. While the definition of cloud computing remains less defined, it "involves the sharing or storage by users of their own information on remote servers owned or operated by others and accessed through the Internet or other connections." ROBERT GELLMAN, THE WORLD PRIVACY FORUM, PRIVACY IN THE CLOUDS: RISKS TO PRIVACY AND CONFIDENTIALITY FROM CLOUD COMPUTING 4 (2009). Examples include video sites, photography sites, webmail such as Hotmail, Google Docs, etc. *Id.*; Alan Wernick, *A Legal Fog*, CHICAGO LAW., May 2009, at 49.

[213] *See, e.g.*, John Boudreau, *Get Ready for 3G: Apple Adds New Functions*, SAN JOSE MERCURY NEWS (July 7, 2008, 1:34 AM), http://chetansharma.com/blog/2008/07/07/iphone-3g-has-business-appeal.html (discussing how 3G iPhone supports "remote wipe" or the ability to instantly remove data remotely).

[214] U.S. DEPT. OF JUSTICE, *supra* note 197, at 30. United States v. Young, Nos. 5:05CR63-01-02, 2006 WL 1302667, at *13 (N.D. Wash. May 9, 2006) (exigent circumstances justified searching a cell phone for text messages where the cell phone had an option for auto deleting messages after one day); United States v. Valdez, No. 06-CR-336, 2008 WL 360548, at *3 (E.D. Wis. Feb. 8, 2008) (search of phone's address book and call history reasonable because, among other reasons, testimony from law enforcement indicated that the cellular provider enabled customers to remotely delete all of the information located on the cell phones); *see also* David C. Morrison, *Behind the Lines*, CONG. Q.: HOMELAND SECURITY, May 2010 (quoting CDNet, "A remote wipe feature on Blackberry and iPhone smartphones protects privacy but 'also allows the accomplices of criminals and terrorists captured by law enforcement remotely to erase all incriminating and intelligence-related data.").

[215] *See* United States v. David, 756 F. Supp. 1385, 1392 n.2 (D. Nev. 1991) (rejecting government argument that exigent circumstances support searching battery-operated computer because agent did not know how long batteries would last).

deletion ability is on the device in question?[216] To further complicate matters, some have noted that cell phones almost never have an exigency because cell phone providers keep records of calls and contents of text messages for at least a few weeks, which can be preserved and retrieved.[217]

While most of these cases have found at least a reasonable expectation of privacy in the phone, the Supreme Court has declined to rule directly. In this hypothetical, one could argue that S.S. did not have a reasonable expectation of privacy to the phone because she brought it to school aware of the school policy that if left on and in use, it could be confiscated by officials. She did not demonstrate a subjective expectation of privacy. However, pending threatened and actual litigation in analogous school searches (in which schools have seized cell phones due to the infraction of the cell phone policy and went on to search them) raises the question as to whether the knowledge of the policy to seize phones waives the right to protect them from search.[218]

Even if school officials could establish that S.S. lacked a reasonable expectation of privacy in the phone, the cases above demonstrate that what is searched matters significantly. Officials in our hypothetical reviewed incoming phone calls, contacts, and text messages. They also pressed one button to access S.S.'s social networking site.[219] The social networking site and email accounts presumably have passwords associated with them if accessed in a "normal" way from a computer. However, assume S.S., like many others, created an unimpeded shortcut to these accounts through one button on her phone. Typically the presence of a password can indicate a subjective expectation of privacy.[220] However, the government could argue that the creation of a one button method to bypass the password, combined with bringing the cell phone to a school setting knowing it could be accessed if seized, may be enough to establish a failure to exhibit an expectation of privacy.

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[216] United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009) (rejecting arguments that police must ascertain storage capacity of phone prior to searching it).

[217] *See, e.g.*, State v. Smith, 920 N.E.2d 949, 955-56 (Ohio 2009) (rejecting the argument that the possibility of permanent deletion of cell phone records yields exigency for a search: "even if one accepts the premise that the call records on Smith's phone were subject to imminent permanent deletion, the State failed to show that it would be unable to obtain call records from the cell phone service provider, which might possibly maintain such records as part of its normal operating procedures"); Mathew Orso, *Cellular Phones, Warrantless Searches, and New Frontier of American Jurisprudence*, 50 SANTA CLARA L. REV. 183, 199 (2010).

[218] Scott Smith, *Cell Text Snooping Draws Ire: Linden School Changes Policy After Incident*, THERECORDNET.COM (Apr. 18, 2008, 12:00 AM), http://www.recordnet.com/apps/pbcs.dll/article?AID=/20080418/A_NEWS/804180326/-1/A_NEWS04 (school announces change in policy after teacher seized cell phone and then read three weeks worth of text messages and the ACLU challenged the policy); Sue Lindsay, *Boulder District OK's Cell Phone Search Limits*, DENVER ROCKY MOUNTAIN NEWS (Apr. 22, 2008, 12:05 AM), http://www.rockymountainnews.com/news/2008/apr/22/boulder-district-oks-cell-phone-search-limits.html (school reaches agreement with ACLU to not review contents of confiscated cell phones unless imminent risk to public safety).

This assumes the social networking site has limited access. However, privacy settings on such sites can be misleading and can cause youth to believe access is limited to contacts.[221] Similarly, some courts have found no expectation of privacy in photos posted online.[222] These facts could indicate that the information obtained by school officials was publicly available. However, the fact that equivalent information can be obtained by other means does not make an unlawful search lawful.[223]

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[219] Some smartphones provide mechanisms for accessing information on the Internet with the touch of an icon or button, circumventing a password.

[220] United States v. Gines-Perez, 214 F. Supp. 2d 205, 225-26 (D.P.R. 2002) (no reasonable expectation of privacy in photo on webpage "without taking any measures to protect the information"), *remanded on other grounds* 90 F. App'x 3 (1st Cir. 2004). *But cf.* Brown-Criscuolo v. Wolfe, 601 F. Supp. 2d 441, 449-50 (D. Conn. 2009) (concluding that a principal had a reasonable expectation of privacy in her personal email communication on her office computer, a prime rationale being that the computer was password-protected and no third parties had access to her computer); United States v. Rosario, 558 F. Supp. 2d 723, 727-27 (E.D. Ky. 2008) (no reasonable expectation of privacy when one takes no safeguards to protect the computer contents, such as utilizing a password shield restricting access to third parties); United States v. Heckencamp, 482 F.3d 1142, 1146-47 (9th Cir. 2007) (the government conceded that Heckencamp had a subjective expectation of privacy and the court held that an objectively reasonable expectation existed "in his personal computer, which was protected by a screensaver password, located in his dormitory room, and subject to no policy allowing the university actively to monitor or audit his computer usage"); United States v. Barrows, 481 F.3d 1246, 1248-49 (10th Cir. 2007) (giving great weight to fact that defendant did not "password protect his computer, turn it off, or take any other steps to prevent third-party use," thus rejecting a reasonable expectation of privacy claim); United States v. Ziegler, 474 F.3d 1184, 1189-90 (9th Cir. 2007) (password protected computers are sufficient for a finding of subjective expectation of privacy and a locked office in the workplace constituted a reasonable expectation in that space); Trulock v. Freeh, 27 F.3d 391, 403 (4th Cir. 2001) (a reasonable expectation of privacy in password-protected computer files is analogous to a locked footlocker, which cannot be searched without a warrant or consented to a search by a third party).

In the end, the traditional *Katz* analysis of privacy expectation creates more questions than answers. Although a cursory analysis suggests an expectation of privacy, deeper review of cell-phone-search case law combined with technological advancements allows litigants much leeway in arguing even that issue. This could result in exposing private information, even password protected information, to law enforcement review.

b. Even If a Search, Under TLO's *and* Redding's *Decreased Standards, Significantly Little Protection For S.S. May Exist*

One could argue that the outcome of the above analysis is without significance because, while this is an unreasonable search of an adult, *T.L.O.* and *Redding* do little to protect students from such an intrusion. *T.L.O.* is an older case and *Redding* offered no significant alteration of *T.L.O.*'s standard. However, youths' sense of privacy may be altered more today than in the past not so much because of a weakening of legal protections post-*T.L.O.*, but because the amount of information available to a school official engaged in the lawful search has grown significantly. As Professor Kerr points out, the difference between the physical world and the digital world is that "physical environments generally limit the scale and location of evidence but digital environments normally do not."[224] Thus, the privacy invasion felt by T.L.O. and Redding was physically limited to what could be fit within the purse or backpack respectively.[225] Because these were limited by physical boundaries, the decreased privacy rights, decreased necessary suspicion, and lack of a warrant requirement can be seen as on balance with the compelling need of the school officials to maintain order and discipline. However, when these same decreased standards now allow access to a vast array of personal information, the unsatisfactory outcome of this standard becomes more apparent.

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[221] Grimmelmann, *supra* note 28, at 1160. ("The social dynamics of social network sites do more than just give people reason to use them notwithstanding the privacy risks. They also cause people to *misunderstand* those risks.") *Id.* at 1164; *see also supra* note 56 and accompanying text.

[222] *Gines-Perez*, 214 F. Supp. 2d at 225-26.

[223] Kyllo v. United States, 533 U.S. 27, 29-30, 35 n.2 (2001).

[224] Kerr, *supra* note 97, at 1012-15.

The first step in analyzing a student search under a traditional analysis is to determine if the examination of the phone was justified at its inception. This examination encompasses reviewing S.S.'s call history, text messages, address book, and her social networking site. To do so, officials must have a reasonable suspicion that these activities will yield evidence of violation of the law or school rule.[226] As phrased in *Redding,* a "moderate chance" must exist that such evidence will be found.[227] Given that there is credible information that within the hour students will be meeting and ingesting prescription medication, that S.S. was linked to this activity by two students (one of whom appears to both be friends with S.S. but also has a self-interest in inculpating S.S.), and that S.S. acknowledged ownership of the day planner and lending it to M.G., there appears a "moderate chance" that her cell phone, now repeatedly receiving calls or text messages just prior to the appointed distribution time, contains evidence of a violation of school policy. Similarly, the pattern of calls may also provide information about who else is involved, or may corroborate her relationship with the other two students.[228] Received texts and announcements on her social network site or wall posts all have a moderate chance of yielding evidence as research indicates that this is a primary way in which youth communicate and arrange their social lives.[229] Consequently, such a low standard, combined with technological vulnerabilities and volume of information, may create the unintended consequence of a loss of protections for access to diaries, interpersonal communication with unrelated parties, and personal data and photographs.

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[225] That is not to say the search of her person was not invasive because it also was limited to her person. Invasions of privacy in the physical world certainly can be severe. Such is why *Redding* noted that a strip search is in a unique category of its own due to its nature. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2641-42 (2009).

[226] New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985).

[227] *Redding,* 129 S. Ct. at 2639.

[228] *E.g.,* People v. Chho, No. CC822335, 2010 WL 1952659, at *5 (Cal. Ct. App. May 17, 2010) (probable cause to search cell phone existed in the totality of circumstances where presence of illegal drugs was coupled with continuous ringing of telephone).

The next step is to review whether the search was intrusive in light of the age or sex of the student.[230] Here age is most relevant. As has been demonstrated, some studies suggest that youth can be more liberal in sharing personal information by conceptualizing the risks to exposing such information differently. Therefore, what may be perceived as excessively intrusive to a digital immigrant may not to a younger person. Furthermore, research suggests the age of the student does matter as older students are more interactive on cell phones than younger students.[231] This could mean that in light of one's age, one's expectation of privacy is very different for youth and the actions appear less intrusive. It is this reality that could risk the demise of legally recognized privacy for youth as society knows it.

The answer to the intrusiveness question is very much connected to exactly what was searched. One published opinion involving a school search of a cell phone, whose holding was limited to denying the school district summary judgment in a civil suit, held that the search exceeded the allowable scope. In *Klump v. Nazareth School District*,[232] school officials seized a student's cell phone when he was observed with it in violation of the school policy.[233] School officials then accessed the phone's directory to obtain numbers of other students and called them to determine whether they would violate school policy by answering their cell phones on campus.[234] As if that were not enough, officials then accessed voicemail and text messaging functions, at one point conversing with Klump's brother without properly identifying themselves.[235] At some point a text arrived on the phone indicating possible drug activity, but the parties disputed when that occurred.[236] At the summary judgment stage, the court was bound to view the facts in favor of Klump.[237] As such, the court found that the seizure of the phone was justifiable.[238] However, accessing the directory and the calls were not justifiable under *T.L.O.* because such activity was designed to find evidence of other students' misconduct for which they had no reasonable belief was occurring.[239]

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[229] AMANDA LENHART & MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, TEENS, PRIVACY & ONLINE SOCIAL NETWORKS 6 (2007), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Society_and_the_Internet/PIP_Teens_Privacy_SNS_Report_Final.pdf (detailing the frequency of Internet use by teenagers and noting that social network sites as a communication tool is the primary reason for joining).

[230] While sex seems less relevant than in the context of the actual case, research indicates that girls Redding's age are more likely to post information online and communicate with others. *See supra* note 43.

[231] *See* MCQUADE & SAMPAT, *supra* note 23, at 32.

[232] 425 F. Supp. 2d 622 (E.D. Pa. 2006).

In contrast, in this hypothetical an argument may be made that the calls within the last hour could lead to evidence of a violation. However, searching older text messages or call logs may exceed what is necessary. Similarly, searching all of S.S.'s contacts may also be excessive in scope. Finally, access to social networking may at first seem intrusive. However, when one recalls the research that girls are most likely to create content online, that youth are less likely to protect it from public view, and that social networking sites are a primary method of scheduling and tracking contacts, the scope may not be excessive. Finally, given that S.S.'s phone is a smartphone, the police may be able to establish an exigency to do a more intrusive search for fear of the "kill order."

While the result of such a motion may be unclear under a traditional analysis, it would seem that the combination of the low standard in *T.L.O.* combined with the decreased privacy rights and understandings of privacy for these youth, may combine to allow access to vast amounts of personal data and diminish a privacy expectation for a large class of people.

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[233] *Id.* at 630.

[234] *Id.*

[235] *Id.*

[236] *Id.* at 631, 639.

[237] *Id.*

[238] *Id.* at 640.

[239] *Id.*

2. Justice Harlan's Fundamental Approach

Justice Harlan recognized the acceptance of his two-part test. He cautioned, however, against a "substitution of words for analysis."[240] Therefore, he felt the law should translate not only rules and customs, but also "values," thus forcing the Court to not only recite expectations, but ultimately to examine "the desirability of saddling [burdens] upon society."[241]

For Justice Harlan, his inquiry would begin with the threshold question of whether under the Constitution and system of government, society should impose upon students the risks of invasion into their cell phones or other digital media without procedural protections.[242] This is determined by (1) assessing the nature of the practice; (2) assessing its likely impact on the individual's sense of security; and (3) balancing that against the utility of the conduct.[243]

The nature of the practice must be broken into the different examinations. In this hypothetical, the nature of school officials examining the outside of the phone and incoming calls is distinct from pressing at least one button to further examine the call log, taking an additional step to review text messages, or pressing an icon to gain access to a social networking site. Each of these practices can be considered a step further into the suspect's private phone.[244] While the Court has recognized the special nature of the school's relationship with students and the "substantial interest" in maintaining discipline on school grounds,[245] one might find the nature of this practice of examining phones for information of impending drug consumption on school property inherently reasonable. However, as the school official accesses additional information stored in the phone, and then on S.S.'s social networking site, the intrusion becomes more attenuated from the valid interest in maintaining a learning environment in the school.

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[240] United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] Gershowitz, *supra* note 97, at 45-57.

[245] New Jersey v. T.L.O., 469 U.S. 325, 339-40 (1985).

As to the second prong, the presence of a school policy affects the impact these different examinations have on the individual. If a youth has advance notice as to the likelihood of her cell phone being searched on school property, then she is afforded the opportunity to avoid the possibility of such an intrusion by avoiding the use of a cell phone on campus. However, if, such as in *Klump*, the policy is only for cell phone use (here arguably S.S. was not using her phone; others were leaving her messages), and allows only for seizure of the phone and not its search, it is likely that there is a significant impact on S.S.'s sense of security. This impact may or may not grow as to the social networking examination. If she has put in place password protections or limited access to this site, the impact on her sense of security is great. However, if the information on that site is available for the public to see, query whether the fact that her phone was used to gain access to publically available information creates a privacy expectation that did not otherwise exist.

These fact-driven concerns must be balanced against the third prong: the utility of this conduct. Here an argument can be made to support all sides. School officials correctly point out that some students facilitate violations of school regulations and laws through social networking sites. They plausibly argue they would be remiss in failing to recognize that and, thus, explore such sites in their effort to maintain a safe learning environment. In the S.S. example, presented with the possibility that several students will soon be ingesting prescription medication, one could argue that perhaps there is utility is searching the phone and text traffic directly preceding the event. On the other hand, S.S. could reasonably argue that the sudden burst of calls was prompted by her removal from class and that her presence in the vice principal's office is more likely the source of this traffic. She could further argue that because the information officials seek can be obtained by a warrant to her cell phone company, there is no utility in this practice. This argument would have more force if there were no impending event.

Justice Harlan's approach does not lead to a decisive answer. It is as fact-driven as the traditional analysis but a better approach because it asks the right questions, i.e., whether this *should* be done. Furthermore, it increases protections for a compromised class by examining the fairness and propriety of an invasion of privacy without a warrant. Such an approach, while imperfect, does offer a more reasoned analysis of the implications of "saddling" youth with such a security challenge.

3. Justice Blackmun's Normative Approach

A majority of the Court in *Smith v. Maryland* recognized that circumstances can occur in which an individual's subjective expectation "has been 'conditioned' by influences alien to well recognized Fourth Amendment freedoms" and that when such occurs, the subjective expectations should have little or no role in ascertaining the scope of Fourth Amendment protections.[246] According to Justice Blackmun, when such a situation arises, the Court should engage in a "normative inquiry" to determine the validity of the governmental action.

The apparent simplicity of this solution is belied by the necessary inquiry. As a threshold matter, one must determine if this is such a situation where expectations have been conditioned in such a way as Justice Blackmun describes. To reach Blackmun's analysis, our hypothetical assumes that S.S. has no subjective expectation of privacy because she came to school with a cell phone displayed and lacking password protection, and the information placed on her social networking site is available to at least some third parties.[247] However, that would not end the inquiry. Has she been conditioned to think in this way? One might argue that she has been so conditioned, based on her youth and her status as a digital native for whom technological sharing of information—sometimes at her own risk—is the natural order.

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[246] Smith v. Maryland, 442 U.S. 735, 741 n.5 (1979).

[247] That is not to say this is the correct conclusion. This is merely assumed to allow examination of Blackmun's approach in situations where *Katz* fails.

Unlike the situation that Justice Blackmun warned against—that the government could reduce subjective expectations merely by announcing its intent, and then exploit those reduced expectations by acting on its announced intention[248]—S.S.'s "conditioning," assuming it exists, was not directly caused by the government. Rather, she and her age cohort, through their differing conceptions of privacy, have arguably conditioned themselves to forego some traditional privacy protections. Or, one could argue they have been conditioned in this regard by the companies who collect and sell their information.[249] Either way, they have done so despite warnings from teachers and other public employees to *limit* their exposure online.[250] Consequently, just as the defendant in *Smith*, youth arguably choose to utilize the Internet and manage their privacy in ways that produce known privacy compromises.

Even assuming that this conditioning of youth sufficiently compromises their subjective expectation of privacy, the next step, this normative inquiry, is not without challenges.[251] First, whose normative should be used? The fundamental problem society may be facing is not the isolated diminished expectation of privacy of an individual, but that of an entire class of people. For an individual, one can more easily examine what general social norms are. Regarding a class, however, it is unclear whose normative applies. It is nearly impossible to isolate or justify the norms of one class as the measure. For example, it is difficult to imagine the propriety of a different privacy standard between the wealthy and poor; professional and laborer; or young and old. A second approach is to attempt to measure broader societal norms. Doing so could lead to minimizing youth's norms from that calculus. With youth's actual experiences excluded from the process, the analysis creates a false sense of what "society" is willing to accept. In essence it would be excluding from an alleged normative analysis what the majority of users online expect.

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[248] *Smith*, 442 U.S. at 741 n.5 (offering examples such as the government announcing that all homes will be subject to warrantless entry or that a refugee from a totalitarian country assumes the government continuously monitors him).

[249] *See supra* note 56 and accompanying text.

[250] *See generally Protecting Youths in an Online World: Hearing before the S. Subcomm. on Consumer Protection and the Comm. On Commerce, Science, and Transportation*, 111th Cong. (2010) (statement of Chairman John D. Rockefeller IV).

[251] See *supra* note 109 for a discussion about "normative."

The final problem with such an approach is that there seems to be no general understanding today of cell phone, text message, and social networking privacy. Americans have occupied houses with yards for generations, giving courts a firm basis on which to assess societal expectations of privacy in connection with them in *Ciraolo* or sealed letters in *Jackson*.[252] However, courts have struggled with exactly what society is willing to recognize when it comes to electronic media as it is now, before societal expectations have been established. Furthermore, in 2010 the Supreme Court declined to make any broad judgments regarding expectations of privacy in text messages because the issue reached the Court "before its [the emerging technology] role in society has become clear."[253] This lack of clarity is aggravated by the fact that society is trying to come to terms with a moving target of much more rapidly developing technology. "Rapid changes in the dynamics of communication and information transmission are evident not just in technology itself, but in what society accepts as proper behavior. . . . At present it is uncertain how . . . norms, and the law's treatment of them, will evolve."[254] Therefore, Blackmun's appraisal has significant shortcomings.

CONCLUSION

Society, with this rapid technological development, finds itself in an unexpected place. The Court sought to guard against an erosion of privacy, among other values, caused by the government. Today, however, a situation unanticipated by the Court has developed where there is an erosion of privacy, but a conditioned erosion driven by a combination of youthful viewpoint and exuberance and rapid technological advances. This development challenges traditional notions of privacy expectations. Of the options discussed, Justice Harlan once again poses the most viable solution. While the resolution of "what if Savana Redding had a cell phone?" may not be any easier to reach through his alternative balancing test, the strongest answer is not always the easiest. Justice Harlan's test, while no simpler, may be the truer. It asks the right questions: in its most basic form, *should* youth be saddled with risking such an invasion of their privacy simply because of their age and technological savvy? Harlan's formula allows courts to examine the actual practice at issue with that question in the background. It also allows room for the reality that the school setting may indeed require "some easing of the restrictions" on searches for the safety of the suspect and others.[255]

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[252] *Ex parte* Jackson, 96 U.S. 727 (1877).

[253] City of Ontario v. Quon, 130 S. Ct. 2619, 2629 (2010).

[254] *Id.* at 2629-30.

Expectations of privacy are evolving and technology's advancement warns against tying social norms and subjective expectations to current technological capabilities. Therefore, the Court's assumption-of-risk approach may become a sterile self-fulfilling exercise unless a more fundamental value-laden analysis is made to determine whether the invasion at issue should occur with or without protection from the Fourth Amendment, and if so, then what degree of protection the Amendment should afford.

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[255] New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

PROTECTING PRETEENS: A CHILD'S PORTION OF THE FOURTH AMENDMENT[†]

Victor Streib[*]

INTRODUCTION

Picture yourself walking down a public sidewalk on a busy city street. Ambling toward you is a toddler, maybe a two-year-old, with no adults in sight. Would you just ignore the toddler and walk on by? Or, might you block her path and begin to question her unusual activity? Would you go so far as to pick her up and carry her back in the direction from which she was ambling, looking for the adult responsible for her care? If your custody of this toddler lasted for a while, might you check to see if she needs a new diaper? Would her protests and obvious "nonconsent" to this unwanted custody and invasion of personal privacy be relevant to you?

Now picture the same scene but replace the oncoming toddler with a young child, maybe an eight-year-old girl. Would you walk on by the young girl? What if it was midnight and this eight-year-old girl was walking in the most dangerous part of town? Would you at least ask her where she lived and why she was out so late? If she just ignored you and walked on, would you stop her and question her further? Could you even see yourself taking custody of this young child until you can get her home? Compare that scenario with an eight-year-old boy on Saturday morning walking down the sidewalk toward the neighborhood park, dribbling a basketball. While some concern might cross your mind, would you ever consider stopping the boy, questioning him, or taking him into custody? What if it was midnight?

[†] This article is based upon the author's paper entitled *Fourth Amendment Rights of Younger Children,* presented at the 2010 Fourth Amendment Symposium at the University of Mississippi School of Law on Mar. 11, 2010, sponsored by the National Judicial College and the National Center for Justice and the Rule of Law.

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What if the oncoming sidewalk ambler is a seventeen-year-old boy? What if it were Saturday morning near the neighborhood park or midnight in the high crime area? Would you feel any particular need to be protective of him, or would you interact with him the same as if he were a man over the age of twenty-one? Might you even walk on by more quickly and cross to the other side of the street out of concern that the seventeen-year-old boy might be a threat to your safety?

The final part of our picture is that now you are a police officer, so the Fourth Amendment presumably constrains your desire to stop, frisk, arrest, and search sidewalk amblers. You know full well that a stop requires reasonable suspicion of criminal activity, and an arrest requires probable cause that this person has committed a specific crime. Would you, as a police officer, ignore the ambling toddler because of no evidence of criminal activity? Would you need such evidence to stop either of the eight-year-olds described above? How about the seventeen-year-old? Assuming the answers to these hypothetical scenarios seem intuitively obvious, how do we justify exceptions to Fourth Amendment requirements based upon a vague sliding scale of age and vulnerability? If we have an even stronger expectation of community caretaking for the police officer than for the private citizen, how do we guide implementation of that function between rescuing children from potential harm and protecting individual liberty and privacy?

Most of us especially treasure our right to privacy, our right to be let alone. This desire—sometimes demand—for privacy may be particularly virulent for teenagers. Do preteen children have privacy rights as well, albeit somewhat reduced in intensity and strength? This article probes that question but finds an almost barren legal landscape in which to begin to frame answers to this question.

I. THE CHILDREN OF THIS INQUIRY

The line between childhood and adolescence is drawn here between ages twelve and thirteen, both to simplify the analysis and to comport with general assumptions of developmental psychology.[1] The beginning of the age range in this analysis is age seven. This recognizes long-established norms from the common-law infancy defence and subsequent statutory provisions which provide a rebuttable presumption of criminal incapacity for persons age seven to fourteen.[2]

A. Young Children, Homicide, and the Justice Process

Children ages seven to twelve interact with many areas of American law, as is reflected in now common law school courses on "children and the law."[3] However, this article narrows the scope to primarily just one facet of American criminal law. Our arena is homicide law and procedure, cases which typically put maximum stress on the criminal justice system and the community in which the homicide occurred. Therefore, we must identify the unique legal issues that arise when homicide offenders are ages seven to twelve at the times of their homicides. Even much younger children have been known to commit homicide, but their cases simply do not enter the legal system and almost never are made public.

Any criminal case, certainly any homicide case, portends serious adverse consequences for preteens. The formal sentencing options of criminal courts and disposition options of juvenile courts are obviously among the most severe, and even the collateral consequences of such convictions and adjudications can be debilitating.[4] Homicide cases typically showcase legal rights and procedures, certainly as compared to minor offenses, and an analysis of preteens' rights might begin with an assumption that they are the same as those of teenagers and adults. At least for such serious juvenile cases, we also will assume that the overriding goal of the defense is to protect the due process rights of the child, including Fourth Amendment rights.

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[1] In an earlier era, offenders may have had to be at least age twelve to have any criminal liability at all, at least for capital offenses. WAYNE R. LAFAVE, CRIMINAL LAW 486 n.8 (4th ed. 2003) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (photo. reprint 1979) (1769); 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 22 (London, Sollom Emlyn 1778)).

[2] LAFAVE, *supra* note 1, at 485-86.

[3] Perusing the tables of contents of the casebooks for such courses reveals the wide range of legal issues, with criminal and juvenile offenses constituting only a very small part of the legal world of children. *See, e.g.*, SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM ix-xxvi (3d ed. 2004); DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW xi-xxxi (2d ed. 2003); LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW ix-xxvi (2002).

The subjects of our inquiry, homicide offenders ages seven to twelve, are very few in comparison to older juvenile homicide offenders, but they do exist. Table 1 below gives us a thirty-year pattern of annual homicide arrests for crimes by offenders in this young age group plus those who were age thirteen. Over the three decades represented, offenders age thirteen and younger averaged just over 100 each year. This group obviously includes thirteen-year-olds who presumably commit more homicides than any one-year age group younger than thirteen. Nonetheless, we can assume that at least some of these 100 plus arrestees each year were age twelve and younger. It is probable that several times that number is a more accurate estimate, but many of these cases are handled more informally as children in need of services from various governmental agencies.

Table 1

Murder and Non-Negligent Homicide Arrestees Ages Thirteen and Younger[5]

Year/Arrests	Year/Arrests	Year/Arrests
1977: 104	1987: 118	1997: 106

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[4] *See, e.g.*, Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1114-15 (2006).

[5] JAMES ALAN FOX & MARIANNE W. ZAWITZ, HOMICIDE TRENDS IN THE UNITED STATES 20 (2007) (Table: Homicide Offenders by Age), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf. The 2006 arrest figure came from FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2006 (2007), *available at* http://www.fbi.gov/ucr/cius2006/data/table_38.html.

1978: 125
1979: 94
1980: 111
1981: 86
1982: 94
1983: 84
1984: 73
1985: 97
1986: 98
1988: 106
1989: 129
1990: 100
1991: 142
1992: 150
1993: 168
1994: 209
1995: 151
1996: 99
1998: 105
1999: 91
2000: 73
2001: 52
2002: 66
2003: 79
2004: 83
2005: 60
2006: 72

30-year total: 3,125
Annual average: 104

B. Selected Examples of Such Cases

The intentional homicide committed a generation ago by Cameron Kocher, a nine-year-old, fourth-grade Cub Scout, stirred national attention.[6] The uncontested facts, as accepted by the Supreme Court of Pennsylvania,[7] seem to indicate an open-and-shut case:

> On the morning of March 6, 1989, a snow holiday from school, Jessica Ann Carr was fatally shot while riding as a passenger on a snowmobile owned by Mr. and Mrs. Richard Ratti, neighbors of the petitioner. On that morning, petitioner had been playing Nintendo at the Rattis' home but stopped playing when Mr. Ratti forbade the children to play because the children had made a mess in the kitchen. Some children, the victim included, started riding snowmobiles but the petitioner returned home. At some point after returning home the petitioner procured the key to his father's locked gun cabinet and removed a hunting rifle equipped with a scope. He loaded the weapon with ammunition, opened a window, removed the screen, and pointed the gun outside. The gun discharged,

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[6] *See, e.g.*, Anthony DePalma, *Grieving for Dead Girl, Town Asks: Should Boy, 10, Face Murder Charge?*, N.Y. TIMES, Aug. 26, 1989, § 1, at 6 (Kocher was nine years and ten months old at the time of the crime, but ten years old by the time he was charged).

[7] Commonwealth v. Kocher, 602 A.2d 1308 (Pa. 1992). In the spirit of full disclosure, readers should be aware that the author was co-counsel for Cameron Kocher in this case.

> striking Jessica Ann Carr in the back and fatally wounding her. The scope of the rifle struck the petitioner's forehead and left a visible wound. He returned the rifle to the gun cabinet and hid the empty shell casing.[8]

On first impression, the *Kocher* case may appear to be a textbook example of murder. Certainly the defendant's acts provide a solid case for the prosecution, but the obvious hurdle is whether a nine-year-old can have a murderous mens rea. In this case, Kocher's parents waived his Fourth Amendment rights when the police came to their house, and the resulting questioning and search revealed the above factual information.[9] Without these evidence-gathering processes, the prosecution would not have had such an open-and-shut case.

Intentional homicide cases of even younger children may raise even more strongly the issue of competence to understand the crime and the process which ensues. Here is a New York case involving a seven-year-old and a nine-year-old:

> The petitions allege that on May 10, 1981 the two respondents acting in concert with intent to cause the death of another did intentionally push Furguron E. and Jabril B. into Jamaica Bay, thereby resulting in the death by drowning of Furguron E. and Jabril B.; or under circumstances evincing a depraved indifference to human life the respondents recklessly engaged in conduct which created a grave risk of death to another by pushing Furguron E. and Jabril B. into Jamaica Bay, thereby resulting in their deaths by drowning.
>
> Respondent Robert G. was seven years, five months old and respondent Darwin J. was nine years, six months old at the time of the alleged offenses. . . .
>
> . . . .
>
> Dr. Ruth Feibel, a qualified psychiatrist . . . . testified that Robert G. presented a developmental lag and that he was less capable than other children his age to understand what the meaning of a trial is. . . . Dr. Feibel stated that Robert did not

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[8] *Id.* at 1309-10.

[9] *See* DePalma, *supra* note 6.

> completely understand the charges against him, nor did he fully grasp the meaning of death. Further, he cannot separate the facts from emotional experience or fantasy from actuality and he was not capable, therefore, of giving a meaningful account to help anybody defend him.[10]

Under what if any circumstances would this seven-year-old be competent to understand and assert his Fourth Amendment rights?

It comes as no surprise that young children sometimes play with fire, so there will be cases in which the arson murder formulation will be apt. Here is a 2007 case involving a ten-year-old Ohio boy:

> The fire scene last week was like some surrealist painter's conceptualization of hell: small children falling from windows, bodies ablaze. A burning woman crying, "Save my babies!" with her dying breath. Firefighters shouldering their way into an inferno in a desperate, doomed rescue effort.
>
> In the end there were five sets of remains: four children, one woman.
>
> . . . .
>
> Police quelled the speculation Friday with news that a 10-year-old boy inside the home intentionally set the fire. Timothy Douglas Byers is charged with juvenile delinquency by way of aggravated arson and five counts of murder, even though officials say he didn't mean to kill his mother, his sister and three other children.
>
> "I know he's only 10, but he took my babies away from me," said Christy Winans, mother of three of the victims. "I hope he never sees the light of day."[11]

The felony murder doctrine is controversial, and the arson-murder version is no exception.[12] However, with the reduced specificity of the criminal intent for murder, this prosecutive approach may be particularly effective against such very young children.

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[10] *In re* Robert G., 468 N.Y.S.2d 422, 423-26 (N.Y. Fam. Ct. 1983).

[11] Mary McCarty & Tom Beyerlein, *Family, Friends Recount Lives of Victims Killed in Fire; Police Say 10-Year-Old Boy Intentionally Set Fire that Killed his Mother, Sister and Three Others*, DAYTON DAILY NEWS, Sept. 23, 2007, at A15.

Children, like adults, may lose self-control when confronted with provocation or in the heat of passionate anger. Here are two equally horrible infanticide cases, one with a seven-year-old in Tampa and the other with a nine-year-old in Trenton:

> The Hillsborough County State Attorney's Office charged an 8-year-old boy with aggravated manslaughter Tuesday in the beating death of his infant half-sister.
>
> . . . .
>
> The boy is accused of throwing 7-month-old Jayza Laney Simms down the stairs of her parents' East Tampa home, then kicking her and beating her with a wood board on May 22. The boy lives in Lakeland with his mother but was visiting his father, his father's girlfriend and their two daughters at the time. He told police he was mad because the baby wouldn't stop crying, so he hit her.
>
> The baby's parents were outside their apartment when the beating occurred. The baby's mother found the battered girl after the boy came outside and said she was bleeding. She was pronounced dead on arrival the same day at St. Joseph's Hospital.
>
> The boy, who was 7 years old at the time, initially denied doing anything to the baby. He later admitted to beating the girl, police said. The boy is being charged as a juvenile, but he will not be arrested or booked into jail.[13]
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>
> An 11-month-old boy was fatally beaten at a home day center, and authorities have charged a 9-year-old boy also attending the day care with the death and the center's owner

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[12] *See generally* LAFAVE, *supra* note 1, at 744-65.

[13] Candace Rondeaux, *Boy, 8, Charged in Death of Baby*, ST. PETERSBURG TIMES, July 20, 2005, at 1B (original paragraph breaks omitted).

> with putting the child in harm's way. Authorities said the older boy repeatedly hit Tahir Francis in the head a week ago, causing skull fractures. Tahir was taken to a hospital and died about six hours later. "I want to know what kind of home the 9-year-old comes from," father Tafawah Francis told The Associated Press on Thursday. "He doesn't understand, you can't do these things to a baby." . . . The 9-year-old has been charged with the juvenile equivalent of aggravated manslaughter and has been released on house arrest to his parents.[14]

Final examples come from the murkier area of unintentional killings resulting from reckless or grossly negligent behavior. Probably the most common scenario for young children that comes to mind is playing with guns:

> Appellant, a nine-year-old boy, was declared to be a ward of the juvenile court . . . after a finding that he committed involuntary manslaughter by shooting another boy in violation of [the Penal Code]. The juvenile court found appellant had no intent to kill but "there was an intent to commit a reckless and dangerous act." Appellant was placed on four years probation less two days served in juvenile hall subject to certain conditions.
>
> . . . .
>
> Appellant's father kept a .22 caliber rifle in the entryway closet of the family home to "scare off dogs." The rifle was in a loaded condition with the safety probably off. Although appellant had once shot the rifle, he had never been taught how to use the gun nor had he received any instruction on the gun's safety mechanism or on safety rules for handling guns. Nevertheless, appellant's father had "mentioned" to appellant that it was unsafe to point a gun at anyone. He had warned appellant to stay away from the gun. Appellant also had been told by his parents not to have playmates in the house when they were absent.

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[14] *Boy, 9 Charged in Baby's Fatal Beating at Day Care*, HOUSTON CHRON., Aug. 31, 2007, at A9.

> The victim was 18 to 24 inches from the muzzle of the gun when it was fired by appellant. The bullet struck the victim in the center of the chest, piercing the heart.[15]

A much stranger case of an eight-year-old child being charged with involuntary manslaughter is this case from Brooklyn:

> With the 8-year-old boy whose school bus antics led to the death of a classmate being held in a diagnostic testing facility, Mayor Bloomberg is questioning the wisdom of pursuing criminal charges against such a young child. The boy . . . apparently snuck onto a locked school bus and released the parking brake, causing it to roll forward and kill . . . a classmate . . . . Police arrested him on charges of criminally negligent homicide, but there is now growing sentiment that the charge was too severe.[16]

The above examples remind us that preteen children can and do commit horrible, outrageous homicides. We can and should expect that such cases be investigated thoroughly and aggressively by law enforcement. Such investigations can be expected to be confronted by typical Fourth Amendment issues.

II. SCOTUS,[17] THE FOURTH AMENDMENT, AND CHILDREN

What unique Fourth Amendment issues arise when the homicide offenders are preteens as described above? It may be only human nature for law enforcement officers to be more protective of younger children, with less thought given to their Fourth Amendment rights against unreasonable search and seizure. The overriding concern may be for protection and rescue from danger, but what do we do when their "rescue" uncovers evidence of criminal activity? We have little specific guidance for officers in these unusual cases.

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[15] *In re* Michael B., 149 Cal. App. 3d 1073, 1073-78 (Cal. Dist. Ct. App. 1983).

[16] E.B. Solomont, *Mayor Questions Merit of Charging Boy in Death of 8-Year-Old Girl*, N.Y. SUN, May 25, 2006, at 4.

[17] This common acronym for The Supreme Court of the United States is used throughout this article.

Major SCOTUS cases addressing the general due process rights of juveniles have almost always dealt with teenagers. *Kent v. United States*[18] in 1966 is the first of this parade of juvenile cases. Sixteen-year-old Morris Kent had been accused of robbery and rape, and the Supreme Court held that this juvenile offender had some procedural due process rights in judicial waiver hearings to transfer his case to criminal court.[19] The next year the Court decided *In re Gault*, the seminal case in juvenile law.[20] Fifteen-year-old Gerald Gault reportedly had made a lewd telephone call to a female neighbor and was then subjected to very informal juvenile court proceedings.[21] The Court's holding in *Gault* is seen as the constitutional domestication of juvenile courts, requiring basic procedural due process rights such as notice of charges, a fair and impartial hearing, assistance of defense counsel, and the privilege against self-incrimination.[22]

In 1970, the Supreme Court decided *In re Winship*.[23] *Winship* involved the youngest offender and the only preteen among these leading cases, here a twelve-year-old was accused of stealing money from the victim's pocketbook.[24] The Court in *Winship* extended the *Gault* requirement of basic due process rights to include the right to proof beyond a reasonable doubt that he violated a criminal law.[25] However, the following year the Court held in *McKeiver v. Pennsylvania*[26] that the procedural due process rights afforded juveniles do not necessarily include the right to a jury in juvenile court delinquency proceedings.[27] Joseph McKeiver was sixteen years old when he committed the robbery for which he was adjudicated delinquent.[28]

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[18] Kent v. United States, 383 U.S. 541 (1966).

[19] *Id.* at 553-55.

[20] *In re* Gault, 387 U.S. 1 (1967).

[21] *Id.* at 4-8.

[22] BARRY C. FELD, JUVENILE JUSTICE ADMINISTRATION IN A NUTSHELL 9-12 (2d ed. 2009).

[23] *In re* Winship, 397 U.S. 358 (1970).

[24] *Id.* at 360.

[25] *Id.* at 378.

[26] McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[27] *Id.* at 553.

Fare v. Michael C.[29] dealt with the custodial interrogation of a sixteen-year-old about a murder. The *Fare* Court acknowledged a juvenile's right to invoke his Fifth Amendment right to remain silent by asking for the assistance of an attorney, but the Court held that this juvenile (Michael C.) had asked only for his probation officer and that was a different matter.[30] Nonetheless, the Court in *Fare* did not move toward reducing the procedural due process rights of juveniles. The last case arrayed here is *Schall v. Martin*,[31] involving the pretrial detention of a fourteen-year-old following his arrest for robbery and assault.[32] On its way to approving pretrial detention the Court noted that "[t]here is no doubt that the Due Process Clause is applicable in juvenile proceedings."[33]

Returning to the focus of this article, it is frustrating that none of those leading juvenile law cases dealt directly with the Fourth Amendment rights of juveniles against unreasonable arrests, searches, and seizures. Almost all SCOTUS Fourth Amendment cases deal with adult suspects and arrestees. Nonetheless, leading scholars assume that the constitutional limitations on arrest and search and seizure "apply to adults and juveniles alike."[34] The attached appendix lists major state cases dealing with a child's Fourth Amendment rights for each state.

But, further dividing the subject class, are preteens and teenagers to be treated the same under these provisions? Statutes and case law generally do not distinguish between preteens and teens for arrest and search and seizure. However, when the issue is whether the juvenile is competent to waive a procedural due process right, it is common for the courts to be concerned about the age and maturity of the juvenile in question.

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[28] *Id.* at 534-35.

[29] Fare v. Michael C., 442 U.S. 707, 710 (1979).

[30] *Id.* at 727-28.

[31] Schall v. Martin, 467 U.S. 253 (1984).

[32] *Id.* at 257-58.

[33] *Id.* at 263.

[34] SAMUEL M. DAVIS ET AL., *supra* note 3, at 1073.

Another difference in the application of Fourth Amendment rights between adults and juveniles is the location of the child at the time of the arrest or search and seizure. If the child is in school, we have several SCOTUS cases to provide guidance, albeit none specifically for preteens. If the child is at home, the Fourth Amendment rights of the child's adult parent, caretaker, or guardian trump those of the child, and even the rights of the child typically are exercised by that adult. For the unaccompanied child on the public sidewalk, the Fourth Amendment environment is completely murky. These situations are explored in more detail below.

A. The Fourth Amendment in Schools

1. The Early Cases

Major SCOTUS cases addressing the Fourth Amendment rights of juveniles have dealt only with teenagers in school settings, with little guidance as to how these holdings might apply to preteens. In *New Jersey v. T.L.O.*[35] in 1985, the Court dealt with a school official's search of a fourteen-year-old student's purse in school.[36] Ten years later in *Vernonia School District 47J v. Acton*,[37] the issue was general drug testing for school athletes, in this case, a seventh grade student who was about thirteen years old.[38] *Vernonia* was extended in *Board of Education v. Earls*[39] to include drug testing for any extracurricular activity by middle and high school students.[40] The new case, *Safford Unified School District #1 v. Redding*[41] dealt with the strip search in school of a thirteen-year-old girl.[42] Although these four leading cases dealt directly only with the Fourth

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[35] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[36] *Id.* at 328.

[37] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[38] *Id.* at 649-51.

[39] Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

[40] *Id.* at 826.

[41] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009).

[42] *Id.* at 2638.

Amendment rights of teenagers, the extended analysis below nonetheless seeks guidance as to our specific issue.

In *New Jersey v. T.L.O.*[43] the Court determined that students have a right to be free from unreasonable searches and seizures by school officials.[44] The appeal stemmed from a decision of the New Jersey Supreme Court suppressing the discovery of marijuana in fourteen-year-old T.L.O.'s purse, because the New Jersey high court determined that an assistant principal's search of her purse was unreasonable.[45] The principal searched the purse only after the respondent was caught smoking in a school bathroom.[46] The Court acknowledged that school officials have an important interest in maintaining safety and order, but that interest must be balanced against the child's constitutionally protected right to privacy.[47] The Court held: 1) school officials are representatives of the State and not parental surrogates who can claim immunity from the Fourth Amendment,[48] 2) school officials must have a reasonable suspicion that the proposed search will turn up evidence of wrongdoing,[49] and 3) the search is limited in scope to the nature of the infraction and must not be excessively intrusive given the age and gender of the accused.[50] Note that *T.L.O.* held that "reasonable suspicion," not "probable cause," was the requirement to make a school search of a student's purse acceptable under the Fourth Amendment. We will come back later to *T.L.O.*'s specific mention of the *age* of the accused.

The Court extended the *T.L.O.* holding in *Vernonia School District 47J v. Acton*.[51] In *Acton*, the Court denied a Fourth Amendment challenge to the school district's policy of randomly testing seventh grade student-athletes for drug use.[52] The

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[43] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[44] *Id.* at 334.

[45] *Id.* at 327-28.

[46] *Id.* at 328.

[47] *Id.* at 339.

[48] *Id.* at 336-37.

[49] *Id.* at 341-43.

[50] *Id.* at 342.

[51] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[52] *Id.* at 664-66.

Court upheld the policy on the grounds that there was a compelling government interest in preventing the cognizable harm of bodily damage resulting from long-term drug use.[53] In *Board of Education v. Earls*,[54] the Court generally extended the *Acton* principle to all extracurricular activities.

The outcome of these cases suggests that children have a lesser right to privacy under the Fourth Amendment than adults where it can be shown that cogent policy reasons exist for denying the right to privacy in a particular instance. The unique situation of the school setting provides those cogent policy reasons, but apparently the age of the child has some significance in making this determination.

2. The Impact of *Redding* in 2009

In *Safford Unified School District #1 v. Redding*,[55] the Court further extended the *T.L.O.* holding in considering whether the Fourth Amendment prohibits public school officials from conducting a strip search of a student suspected of possessing and distributing a prescription drug on campus in violation of school policy.[56] The majority held that while school officials had reasonable suspicion to search the child's backpack and outer clothing, that suspicion did not extend to searching the child's underwear. The Court's opinion, written by Justice Souter, was based in large part on its previous decision in *T.L.O.* The Court upheld that a school search "will be permissible . . . when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[57]

In October 2003, an assistant principal at Safford Middle School, Kerry Wilson, called Savana Redding, then thirteen years old, into his office for questioning.[58] Wilson showed Redding four 400-mg ibuprofen pills and one 200-mg naproxen pill, and then told her that he had received a report from another student that she was passing out pills to other students.[59] Redding denied doing so and allowed Wilson to search her backpack.[60] When Wilson was unable to find any other pills, he instructed an administrative assistant to take Redding to the school nurse's office to search her clothing for pills.[61] In the presence of the administrative assistant and the school nurse, Redding was asked to remove her shirt and pants.[62] Redding was then "told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree."[63] No pills were found on Redding that day.[64]

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[53] *Id.* at 661-63.

[54] Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

[55] Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009).

[56] *Id.* at 2637

[57] *Id.* at 2639 (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

[58] *Id.* at 2638.

As it relates to the privacy rights of children, section III-B of the Court's opinion sheds the most light on when a child acquires the Fourth Amendment right to privacy and how far that right extends. The Court speaks of Redding's "subjective expectation of privacy against" the type of search she was forced to undergo and "the reasonableness of her expectation."[65] Specifically, the Court mentions that while Redding may have expected her body to be exposed in order to change her clothes for gym class, she did not expect to have her body exposed during a strip search.[66] Therefore, the school's actions impinged on her Fourth Amendment rights.[67] Accordingly, a child's right to privacy is based upon the factors outlined in *T.L.O.* plus the child's own expectation of privacy and the reasonableness of that expectation.[68]

Therefore, as it stands today, a court reviewing a school administrator's search of a child must determine four things.

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[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 2641.

[66] *Id.* at 2642.

[67] *Id.*

[68] *Id.*

First, there was a reasonable suspicion that the search would turn up evidence of the student's violation of some rule or policy. Second, the extent of the search was on par with the nature of the infraction, and not overly intrusive in light of the age and gender of the child. Third, the search did not exceed the student's expectation of privacy. And fourth, if the search did exceed the child's expectation, the child's privacy expectation must be reasonable in light of the privacy expectations of other, similarly situated children.

Based on this holding, it seems that the extent of a child's Fourth Amendment right to privacy varies from child to child. It cannot be stated with absolute certainty exactly how much protection the Fourth Amendment provides children, because, to borrow language from Justice Thomas, a child's Fourth Amendment rights are "vague and amorphous."[69] Whether a child has a right to privacy is based on that child's own subjective mental state. Further, even if a child recognizes that she has a right to privacy, that right only extends as far as the child expected and only if other children determine her expectation to be reasonable. That creates problems in and of itself, because what may seem reasonable to the average eight-year-old is likely not reasonable to the average jury member. Indeed, are preteens' right to privacy ever recognized as "reasonable" by society?

Therein lies the rub, because what a child considers to be reasonable is not necessarily reasonable to an adult, such as the six-year-old with the "No Parents Allowed" sign on his bedroom door. Difficulties also arise because of the Court's reliance on the language from *T.L.O.* stating that the extent of a search is "not excessively intrusive in light of *the age and sex* of the student and the nature of the infraction."[70] For instance, Redding's expectation of privacy was deemed reasonable, in part, because "adolescent vulnerabilit[ies] intensifie[d] the patent intrusiveness of the exposure."[71] Does that mean a thirteen-year-old girl has a higher expectation of privacy because of the changing nature of her physiology than an eight-year-old boy who has not yet reached puberty? There is also the additional question of whether the age and gender factors are only applicable on review, or whether any government action must take those factors into account.

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[69] *Id.* at 2646 (Thomas, J., concurring in part and dissenting in part).

[70] New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (footnote omitted) (emphasis added).

[71] *Redding*, 129 S. Ct. at 2641.

While the Court was able to provide some framework for how the Fourth Amendment applies to children, it seems as if the Court's standard is so flexible that it creates unjust results in a number of likely scenarios. Therefore, the *Redding* decision appears to have created more questions than it answered about how the Fourth Amendment applies to children.

B. Fourth Amendment Rights Outside of Schools

It seems generally accepted that children in school are already in some form of custody and have lowered expectations of privacy for their persons and possessions. As for children located elsewhere at the time, "The Supreme Court has not explicitly addressed the applicability of the Fourth Amendment to arrests and searches of juveniles outside of the school context."[72] The most obvious place to find children other than in school is in their homes, typically the most protected area for Fourth Amendment purposes. In the spirit of our opening hypothetical situations, consider the options if the police knock on the door to a house and it is opened by a child standing inside the home. Assuming the police would need probable cause plus almost always a warrant to search the house, could a child living in the house consent to that search and waive any Fourth Amendment rights? If the child refuses to consent, can the child's parent override the child's refusal to consent to a search? What about consensual arrest versus an arrest? Does it make a difference if the child is seventeen, or thirteen, or nine?

One of the first suggestions that the Court should give juveniles the full panoply of protections under the Fourth Amendment outside of schools came in 1980 when Justice Marshall wrote a fairly lengthy dissent to the Court's denial of petition for certiorari in *Levell v. California.*[73] The petitioner was a thirteen-year-old who was suspected of burglary.[74] After becoming a suspect, police contacted the child's mother and she agreed to bring him to the station for questioning.[75] When she failed to bring him in at the appointed time, an investigator told two officers to go to her home to find out when she would bring the child to the station for questioning.[76] The officers went to the house and upon finding the mother in bed, they asked her why she did not bring the boy in for questioning the previous day and if she still planned to bring him.[77] She told them that her car had broken down, but they could take the boy who was also sleeping at that very moment.[78] The police woke up the boy and took him to the police station where they promptly gave him his *Miranda*[79] rights, which he waived prior to confessing to the burglary.[80]

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[72] FELD, *supra* note 22, at 69.

Justice Marshall's dissenting opinion observed that "[i]f [the boy] had been five years older when the arrest occurred" there would be no doubt that the arrest would be deemed illegal under the Fourth Amendment.[81] Furthermore, his "subsequent confession would have to be suppressed as the fruit of an illegal arrest."[82] Marshall cited all of the major cases extending constitutional rights to minors in finding that, but for parental consent, the Fourth Amendment would have protected the child.[83] In addition to being troubled by the fact that parents could waive the constitutional rights of their children as they saw fit, Marshall was disturbed that the Court determined that the boy was too immature to decide whether to accompany the police to the station, but not so immature as to knowingly and voluntarily waive his *Miranda* rights before confessing to the burglary.[84]

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[73] Levell W. v. California, 449 U.S. 1043 (1980) (Marshall, J., dissenting)

[74] *Id.* at 1043.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 1043-44.

[78] *Id.*

[79] Miranda v. Arizona, 384 U.S. 436 (1966).

[80] *Levell W.*, 449 U.S. at 1044.

[81] *Id.* at 1045 (citing Dunaway v. New York, 442 U.S. 200, 216 (1979)).

[82] *Id.* at 1046 (citing Wong Sun v. United States 371 U.S. 471, 484 (1963)).

[83] *Id.* at 1045-49.

Consider the situation in which the child is alone on the streets with no teacher or parent to provide custody. One jurisdiction that has explored this issue more thoroughly than most is the State of Washington. That state has recognized that the community caretaking exception to the Fourth Amendment can apply to protecting the welfare of children, freeing police from strict compliance with Fourth Amendment prohibitions when dealing with children. Two cases that are almost factually identical bear directly on when that exception applies. In *State v. Acrey*,[85] the Supreme Court of Washington held that a search did not violate a minor's Fourth Amendment rights under the community caretaking exception, but in *State v. Kinzy*[86] the court held that police officers had unlawfully detained and searched a minor, therefore the community caretaking exception did not apply.

In *Kinzy*, two officers on bicycle patrol stopped at a street corner where a girl, Kinzy, who appeared to be between approximately eleven and thirteen years old, was in the company of two other girls and an older man late on a school night.[87] The officers stated that they stopped Kinzy because they perceived her to be a "youth at risk" based on the fact that the street corner was in an area known for drug trafficking and because the police officers knew her male companion based on previous narcotics contacts.[88]

When the police stopped to question her, Kinzy put her head down and began walking away.[89] The police then grabbed her and began questioning her.[90] Kinzy told police her name and actual age, sixteen, but the police still believed her to be younger based of her appearance.[91] The police also decided to search Kinzy for weapons, because she was acting nervous and kept putting her hands in her pockets.[92] The officers completed a pat down search and did not find any weapons, but they asked her to keep her coat open for their safety.[93] At that point, one of the officers noticed that there appeared to be "white/creme flecks of rock cocaine on the black lining of [her] coat."[94] A field test concluded that the substance was in fact cocaine and Kinzy immediately admitted to having more cocaine in her bra.[95]

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[84] *Id.* at 1047-49.

[85] State v. Acrey, 64 P.3d 594 (Wash. 2003).

[86] State v. Kinzy, 5 P.3d 668 (Wash. 2000).

[87] *Id.* at 670-71.

[88] *Id.* at 671.

[89] *Id.*

[90] *Id.*

[91] *Id.*

At trial, Kinzy sought to have the cocaine deemed inadmissible evidence because it was the result of an illegal search and seizure.[96] The trial court denied her motion and found that the cocaine was admissible under the "community caretaking exception" and the intermediate appellate court upheld that decision.[97] The state supreme court, however, reversed that finding.[98]

The state supreme court examined whether the stop was lawful under two exceptions to the Fourth Amendment. First, the court determined that detaining Kinzy was not lawful under *Terry v. Ohio*[99] because they did not have "a reasonable, articulable suspicion that criminal activity [was] afoot."[100] Instead, the officers stopped Kinzy because they were concerned about her safety.[101] Next, the court determined that the stop of Kinzy did not fall under the "community caretaking function"[102] exception to the Fourth Amendment, because there was potential for abuse of the community caretaking exception.[103] The court balanced the public's interest in ensuring the safety of its children against Kinzy's right to be from police intrusion and found that, under the particular circumstances, Kinzy's right to "freedom of association, expression and movement" was more important than risking police abuse of the exception.[104]

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[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 672.

[97] *Id.* at 681.

[98] *Id.*

[99] Terry v. Ohio, 392 U.S. 1 (1968).

[100] *Kinzy*, 5 P.3d at 675 (quoting Illinois v. Wardlow, 528 U.S. 119, 123 (2000)).

[101] *Id.*

[102] *See* Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

[103] *Kinzy*, 5 P.3d at 679.

The Supreme Court of Washington again considered the application of the community caretaking exception to children three years later in *State v. Acrey.*[105] In *Acrey*, police responded to a 911 call about "juveniles fighting in a commercial area" of Renton, Washington.[106] The call came in shortly after midnight on a weeknight and the officers who responded to the call found five males "who appeared quite young and fit the description provided by the anonymous caller" at the location given by the caller.[107] The officers stopped the five boys and asked them if they had been fighting.[108] The boys responded that they were not fighting and that they had "been playing around and were walking to a 7-Eleven convenience store" approximately five miles away.[109]

The officers determined that the boys had in fact not been fighting and were not engaged in any criminal activity, but because "it was after midnight on a week night in a commercial area with no open businesses and no nearby residences" they should get the boys to their respective homes.[110] The officers then told the boys to sit on the sidewalk while they contacted the boys' parents.[111] When the officers asked Adam Acrey for his name and the telephone number were they could reach his parents, he told them his name was "Jubuare Davison," but gave them his mother's real name and his real home telephone number.[112] The officers were able to contact Acrey's mother and she asked them to bring him home because she did not own a vehicle.[113]

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[104] *Id.* at 676-79.

[105] State v. Acrey, 64 P.3d 594 (Wash. 2003).

[106] *Id.* at 596.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at 596-97.

Prior to taking Acrey home, one of the officers conducted a pat down search to check Acrey for weapons, in spite of the fact he did not think Acrey was armed, because such a search was standard department procedure for the officer's own safety.[114] The officer felt something at the bottom of Acrey's pants and, when asked what the object was, Acrey told him it was money.[115] The officer removed the object and discovered that it was in fact paper money, some coins, and two baggies of marijuana.[116] Acrey was then placed under arrest and a search incident to that arrest yielded more marijuana, money, and crack cocaine on Acrey's person.[117]

Acrey's motion to have the evidence of the drugs suppressed at trial was denied at both the trial and intermediate appellate court levels.[118] On appeal to the state supreme court, Acrey conceded that the officers' initial stop of the boys on suspicion of fighting was a permissible *Terry* stop.[119] Acrey relied on *Kinzy*, however, and argued that the evidence should nonetheless be suppressed because he should have been let go once it was determined was not engaged in criminal activity.[120] The court disagreed and found that the police had committed no wrong in further detaining the boy to contact his mother.[121]

The court distinguished Acrey's case from *Kinzy* in two ways. First, unlike *Kinzy*, the police had reason to stop Acrey and his friends under *Terry*, where the police had no reason to stop Kinzy.[122] Second, the court adopted the opinion of the lower appellate court in holding that the purpose for detaining Acrey was to confer with his mother, whereas the detainment of Kinzy was to enforce a de facto curfew law that abused the community caretaking exception.[123] In Kinzy's case the police never shifted from their law enforcement duties, but with regards to Acrey, the officers became "divorced" from their law enforcement duties and instead focused on ensuring the welfare of Acrey and his friends.[124] Therefore, the intrusion on Acrey's freedom for purposes of contacting his mother was slight when balanced against the public's interest in protecting children.[125]

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[114] *Id.* at 597.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 598.

[120] *Id.* at 599.

[121] *Id.* at 603.

[122] *Id.* at 601.

[123] *Id.*

The *Kinzy* and *Acrey* decisions offer little practical guidance to Washington police officers about when they may lawfully search children without violating the Fourth Amendment. If the officers do not believe a child is engaged in criminal activity, then stopping and frisking the child for any other purpose is seemingly an automatic violation of the child's Fourth Amendment right to privacy. If, however, the police have a reasonable suspicion that the child has or will engage in criminal activity, then there is the potential that a subsequent frisk or search will be lawful even if the police determine that there is no longer a basis for the criminal stop. As *Kinzy* demonstrated, even if police in Washington truly believe they are acting in the best interests of the child and the community, without something more they cannot impinge upon the child's right to privacy.

III. FOURTH AMENDMENT GUIDANCE FOR POLICE OFFICERS

Police officers are expected to investigate crimes, deliver babies, quell disturbances, and generally act as ambassadors of goodwill within the community. A specific definition of the role of the police is elusive at best: "The total range of police responsibilities is extraordinarily broad. . . . Anyone attempting to construct a workable definition of the police role will typically come away with old images shattered and with a new-found appreciation for the intricacies of police work."[126] As such, the role that police officers are expected to take in the community does not always comport with a rigid application of the Fourth

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[124] *Id.* at 602.

[125] *Id.*

[126] Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 261 (1998) (quoting HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 21 (1977)).

Amendment, particularly when it comes to dealing with children.

Particularly because we know from *T.L.O.* and *Redding* that children have some Fourth Amendment rights, but because the extent of those rights varies from state to state (see appendix), it is difficult to formulate clear-cut rules that police can always abide by and not violate a child's Fourth Amendment rights. The problem stems from the fact that children are always assumed to be in the custody of someone, whether it be their parents or the state. Children are always presumed to be in custody on one of three levels.

At the first level, children are subject to the authority and control of their parents. These duties stem from early American common law:

> The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. . . . The duties that are enjoined upon children to their parents are obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives.[127]

The Supreme Court upheld this view of parental power in *Meyer v. Nebraska*[128] and *Pierce v. Society of Sisters.*[129] Both cases recognized that parents have the right to direct the upbringing of their children and, with very few exceptions parents are still entitled to that right. In the context of the Fourth Amendment, this right most commonly manifests itself in parental dominion over the home, because "courts tend to recognize a superior right in the parents to keep the family home free of criminal activity."[130] As a result, parental rights within the home are almost always superior to those of a child, so much so that a parent may consent to a police search even when a child is "present and objecting."[131] Even though California recognized that parents cannot consent to search of all of a child's belongings,[132] LaFave points out that the *Scott K.* rule is a minority position.[133] Therefore, police officers will most likely not violate a child's Fourth Amendment rights within the home if they obtain prior consent to search from the child's parents or legal guardians.

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[127] SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW IN A NUTSHELL 11-12 (2d ed. 2003) (quoting JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 216, 222 (Boston, Little, Brown, & Co. 11th ed. 1866)).

[128] Meyer v. Nebraska, 262 U.S. 390 (1923).

[129] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

While parents generally have unchallenged authority in their homes, in certain instances parental authority over the child may be superseded by the state. The government can override parental interest either through the use of its traditional police powers or parens patriae. "The police power is the state's inherent plenary authority to promote the public health, safety and welfare generally."[134] The police power is most commonly exerted when the police perform law enforcement functions, like criminal investigation or arrest. The doctrine of parens patriae is the state's ability to enforce "the interests of society to protect the welfare of children" when necessary (and over any objection of the child's parents).[135] Parens patriae is most commonly seen when the state removes a child from a home because it has determined that the child's parents are unfit to raise their child. But within the context of the Fourth Amendment, parens patriae power appears to be coterminous with the 'community caretaking' exception.

As illustrated by *Kinzy* and *Acrey*, these two state powers are often in tension with one another for purposes of the Fourth Amendment. The traditional view of the Fourth Amendment adopted by the Supreme Court is that when police are engaging in purely law enforcement functions, searches

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[130] 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.4(b) (4th ed. 2004).

[131] *Id.*

[132] *In re* Scott K., 595 P.2d 105, 111 (Cal. 1979).

[133] LAFAVE, *supra* note 130, at § 8.4(b).

[134] RAMSEY & ABRAMS, *supra* note 127, at 10.

[135] Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

"conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . ."[136] The Court has also held that there are few exceptions to the warrant requirement and those exceptions are "specifically established and well-delineated . . . ."[137] Therefore it seems that when police officers come into contact with juveniles for purposes related to law enforcement, then at a bare minimum those children should be afforded the same Fourth Amendment protections as adults. Greater protections should be afforded to children if police officers reasonably doubt that the child is capable of making adult-like decisions. The closer a child is to the age of majority, the less likely it will be that the child will need more protection than what is given to adults.

Consider *Kinzy*, for example. There the court determined that Kinzy's right of privacy was coextensive with that of an adult because of her age, relative intelligence, and demonstrated high level of maturity. Had she been only eight or nine years old, it is unlikely that the court would have treated her in the same fashion, because even at nine years old it is less likely that she would be able to make the adult-like decisions necessary to protect her interests. The obviously murky area for police, and the courts, is when the child in question is right at pubescent age. As the Supreme Court recognized in *Redding*, at that age children begin to exhibit a greater expectation of privacy and they also become more capable of making intelligent decisions. But, like all things in life, a police officer dealing with a child of twelve or thirteen should err on the side of caution and offer the child the same Fourth Amendment protection that an adult would be given in the same circumstances.

The same advice should be parsed out to police officers when they must deal with children for non-law enforcement purposes, i.e., instances where they are purely concerned with the child's welfare. When the State is "[a]cting under its parens patriae power, [it] may pursue ends that would be impermissible under the police power because they are unrelated to any harm to third parties or to the public welfare."[138] Therefore, police officers should take even greater caution in protecting the child's right to privacy, because it is more likely that the police power will conflict with what is in the best interests of the child.

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[136] Katz v. United States, 389 U.S. 347, 357 (1967).

[137] *Id.*

CONCLUSION

The Supreme Court has adhered to the Fourth Amendment's warrant requirement, because it has determined that a warrant issued by a judge or magistrate acting as a neutral third-party is the best means to protect against potential overzealousness by police officers so that the Fourth Amendment continues as a strong shield against invasions of personal liberty.[139] One of the exceptions to the Fourth Amendment's warrant requirement is the previously mentioned "community caretaking function":

> Local police officers, unlike federal officers, frequently investigate [incidents] in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.[140]

In *Cady*, the Court determined that evidence of a murder was admissible because it was first discovered while police were not acting in a law enforcement capacity. Rather, it was discovered after the police arrested an off-duty Chicago police officer, Cady, for drunk driving and they began searching for his service revolver. The police believed Cady was required to carry the gun with him at all times and, rather than risk having the gun fall into inexperienced or malicious hands, they searched his vehicle after he passed out and could not tell them where it was. The Court recognized that it was reasonable and in the best welfare of the community to allow police to search for the weapon in that situation. Therefore, because the search was reasonable given the circumstances, the resulting unexpected discovery of the murder evidence was admissible.

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[138] Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1199 (1980).

[139] Wong Sun v. United States, 371 U.S. 471, 481-82 (1963).

[140] Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

Courts have generally moved to this standard of reasonableness when determining whether a search comes under the community caretaking exception.[141] The test for reasonableness involves balancing the intrusion, both in its scope and duration, against the need for the intrusion.[142] So, for example, when police stop a child after midnight on a Wednesday in October, the intrusion on his liberty is less likely to violate the principles of the Fourth Amendment if he is eight years old, but more likely to violate the amendment if he is seventeen. The test of reasonableness can thereby be seen as one of commonsense. If police see the seventeen year old and do not have reason to believe that criminal activity is afoot, then the Fourth Amendment requires letting him continue on his way.

If the police encounter the younger child, they probably have the ability to at least stop and question him about his age and identity, and to try and contact his parents. The permission to stop him, however, is not permission to search him. Using *T.L.O.* and *Redding* for guidance, the police cannot search him unless there is at least reasonable suspicion that the boy has committed some crime. As *Acrey* demonstrates, the police are probably limited to calling the boy's mother to find out whether she wants the boy to come home. And, as absurd as the result seems, they cannot go against the mother's wishes unless it is explicitly clear that allowing the boy to continue on his way will result in some great, cognizable harm. Not allowing the boy to continue on his way would violate both the boy's Fourth Amendment rights and his mother's right to direct his upbringing.

If for some reason the police decide to take the boy home without the consent of his parents, either because they cannot establish contact or it is in the boy's best interests to be taken out of the area, the question then becomes one of whether the police can search the child prior to taking him home. Most likely, the police can conduct a pat down search of the child prior to transport, because the limited intrusion on the child's right is outweighed by the officer's need to ensure his own safety. Therefore, a court would likely deem the pat down search in that instance to be reasonable.

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[141] Livingston, *supra* note 126, at 263-64.

[142] *Id.* at 264.

In an earlier work, this author examined other aspects of preteens caught up in the criminal justice system but did not directly address Fourth Amendment issues.[143] That article suggested:

> [A] proposal to eliminate all children (age twelve and under) who commit homicide from offender jurisdiction in any court of law, either juvenile or criminal. In almost every case, those children would be in dire need of court services such as counselling and treatment, but imposing punishment should be forbidden. Children of such tender years almost never would be capable of having the mens rea required for homicide crimes. They should never be allowed to waive their rights regarding arrest, search and seizure, and interrogation, and almost never would they be competent to be tried. Most certainly, imposing adult punishments upon children, even for homicide, is unjust.[144]

This article's investigation of the even murkier area of Fourth Amendment rights of preteens continues to support this proposal.

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[143] Victor Streib, *Precocious Killers: Justice for Homicidal Preteens*, 28 CHILD. LEGAL RTS. J. 33 (2008).

[144] *Id.* at 43.

APPENDIX

State Cases Dealing with a Child's Fourth Amendment Rights

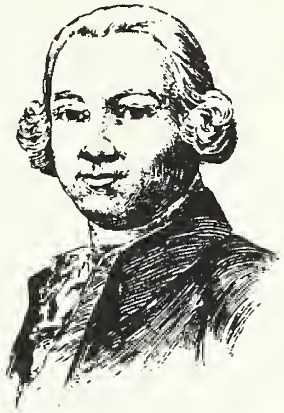
State	Case(s)
Alabama*	*Ex parte* W.T.K., 586 So. 2d 850 (Ala. 1991)
Alaska*	J.M.A. v. State, 542 P.2d 170 (Alaska 1975)
Arizona (not recognized by State SC, but recognized by both app. Divisions)	*In re* Tiffany O., 174 P.3d 282 (Ariz. Ct. App. 2007); Bell v. Superior Court In and For Pima County, 574 P.2d 39 (Ariz. Ct. App. 1977)
Arkansas	
California*	*In re* William G., 709 P.2d 1287 (Cal. 1985); *In re* Scott K., 595 P.2d 105 (Cal. 1979)
Colorado*	People *ex rel.* R.A., 937 P.2d 731 (Colo. 1997); People *ex rel.* D.F.L., 931 P.2d 448 (Colo. 1997); People *ex rel.* S.J., 778 P.2d 1384 (Colo. 1989)
Connecticut*	Ramos v. Town of Vernon, 254 Conn. 799, 761 A.2d 705 (Conn. 2000)
Delaware	State v. Christine D., No. JN88-0822, 1989 WL 5502 (Del. Fam. Ct. Jan. 25, 1989)
D.C.	*In re* B.K.C., 413 A.2d 894 (D.C. 1980)
Florida	L.S. v. State, 805 So. 2d 1004 (Fla. Dist. Ct. App. 2001)
Georgia*	*In re* D.H., 673 S.E.2d 191 (Ga. 2009)
Hawaii*	*In re* Doe, 73 P.3d 29 (Haw. 2003)
Idaho	
Illinois*	*In re* Lakisha M., 882 N.E.2d 570 (Ill. 2008)
Indiana*	Trowbridge v. State, 717 N.E.2d 138 (Ind. 1999)
Iowa	*In re* D.G., No. 01-0752, 2002 WL 31307836 (Iowa Ct. App. Oct. 16, 2002)
Kansas	*In re* J.M.E., 162 P.3d 835 (Kan. Ct. App. 2007)
Kentucky*	Lamb v. Holmes, 162 S.W.3d 902 (Ky. 2005) (school setting)
Louisiana	*In re* Moten, 242 So. 2d 849 (La. Ct. App. 1970)
Maine*	State v. Michael M., 772 A.2d 1179 (Me. 2001)
Maryland*	*In re* David S., 789 A.2d 607 (Md. 2002)
Massachusetts*	Commonwealth v. A Juvenile (No.2), 580 N.E.2d 1014 (Mass. 1991)
Michigan	People v. Taylor, 542 N.W.2d 322 (Mich. Ct. App.

State	Case(s)
	1995)
Minnesota*	*In re* B.R.K., 658 N.W.2d 565 (Minn. 2003)
Mississippi	
Missouri*	*In re* J.R.M., 487 S.W.2d 502 (Mo. 1972)
Montana*	*In re* B.A.M., 192 P.3d 1161 (Mont. 2008); State v. Allen, 612 P.2d 199 (Mo. 1980)
Nebraska*	*In re* Jabreco G., 683 N.W.2d 386 (Neb. Ct. App. 2004); *In re* Andre W., 590 N.W.2d 827 (Neb. 1999)
Nevada*	A Minor v. State, 517 P.2d 183 (Nev. 1973)
New Hampshire*	*In re* Vernon E., 435 A.2d 833 (N.H. 1981)
New Jersey	State v. Lowry, 230 A.2d 907 (N.J. Super. Ct. Law Div. 1967); *In re* L.B., 240 A.2d 709 (N.J. Super. Ch. Div. 1968)
New Mexico*	State v. Paul T., 993 P.2d 74 (N.M. 1999)
New York*	*In re* Marrhonda G., 613 N.E.2d 568 (N.Y. 1993); *In re* Williams, 267 N.Y.S.2d 91 (N.Y. Fam. Ct. 1966)
North Carolina	*In re* I.R.T., 647 S.E.2d 129 (N.C. Ct. App. 2007); *In re* J.L.B.M., 627 S.E.2d 239 (N.C. Ct. App. 2006)
North Dakota	
Ohio*	*In re* C.S., 847 N.E.2d 1177 (Ohio 2007); State v. Davis, 381 N.E.2d 641 (Ohio 1978)
Oklahoma	
Oregon*	State v. Hall, 115 P.3d 908 (Or. 2005); State v. Carsey, 664 P.2d 1085 (Or. 1983)
Pennsylvania	*In re* Harvey, 295 A.2d 93 (Pa. Super. Ct. 1972)
Rhode Island	
South Carolina	*In re* Thomas B.D., 486 S.E.2d 498 (S.C. Ct. App. 1997)
South Dakota*	Thornton v. City of Rapid City, 692 N.W.2d 525 (S.D. 2005)
Tennessee	State v. Roland, No. E2002-00927-CCA-R3-CD, 2003 WL 21983024 (Tenn. Crim. App. Dec. 22, 2003) (noting juveniles not entitled to higher constitutional protections)
Texas	Lanes v. State, 767 S.W.2d 789 (Tex. Crim. App. 1989)
Utah*	State *ex rel.* A.C.C., 44 P.3d 708 (Utah 2002)

State	Case(s)
	(declining to address whether Fourth Amendment applied to juvenile delinquency proceedings but nonetheless using Fourth Amendment reasoning in holding that the defendant did not have a reasonable expectation of privacy); *In re* K.C.C., 636 P.2d 1044 (Utah 1981).
Vermont	
Virginia	
Washington*	State v. Acrey, 64 P.3d 594 (Wash. 2003); State v. Kinzy, 5 P.3d 668 (Wash. 2000)
West Virginia*	State v. Todd Andrew H., 474 S.E.2d 545 (W. Va. 1996)
Wisconsin	
Wyoming*	*In re* ALJ, 836 P.2d 307 (Wyo. 1992)

* Denotes decision of that State's highest court.

The James Otis Lectures



ANNUAL LECTURE SERIES

This lecture series is fittingly named after the man who not only ignited the American Revolution, but whose very words in opposition to the writs of assistance inspired the Fourth Amendment, James Otis.

Born in Great Marshes (now West Barnstable), Massachusetts, the eldest of thirteen children, Otis would devote his life to the law, as his father and grandfather had done before, becoming one of the most revered trial advocates and legal orators throughout Massachusetts, earning him the coveted position as Advocate General of the Vice-Admiralty Court at just thirty-one years of age, a position he would later resign to champion the cause against the Crown's arbitrary issuance of writs of assistance. The writs were general search warrants that permitted the authorities to search anywhere they pleased for any reason—or for no reason. In one of the first defiant stands against British authority in the Colonies, Otis attacked the writs as "'against the fundamental principles of law.'"[1] He asserted, among other things: "A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege."[2]

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[1] Telford Taylor, Two Studies in Constitutional Interpretation 36-37 (1969) (quoting John Adams, Petition of Lechmere, *in* 2 Legal Papers of John Adams 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

John Adams, who witnessed Otis's impassioned oration, afterward declared: "Every man of an [immense] crowded [a]udience appeared to me to go away, as I did, ready to take [a]rms against [Writs] of Assistance. Then and there was the first scene of the first [a]ct of [o]pposition to the arbitrary [c]laims of Great Britain. Then and there the child Independence was born."[3]

Although Otis may have lost his case before the Massachusetts Superior Court in Boston's Old Town Hall that day, he gained a place in history. In that case, "the American tradition of constitutional hostility to general powers of search first found articulate expression."[4] It was Adams, so inspired by Otis's words, who later drafted Article Fourteen of the Massachusetts Declaration of Rights of 1780, which served as the model for the Fourth Amendment.

Otis would become one of the greatest Patriots our country has ever known. Though eventually reduced to insanity and ultimately silenced by a bolt of lightning, James Otis will forever remain first among America's Fourth Amendment advocates.

Thomas K. Clancy[*]

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[2] *Id.* at 37 (quoting John Adams, Petition of Lechmere, *supra* note 1, at 142).

[3] John Adams, Petition of Lechmere, *supra* note 1, at 107.

[4] M.H. SMITH, THE WRITS OF ASSISTANCE Case 7 (1978).

[*] Director, National Center for Justice and the Rule of Law. The Center, and consequently this lecture series and articles stemming from it, is supported by Grant No. 2000-DD-VX-0032 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles are those of the author and do not represent the official position of the United States Department of Justice.

THE FOURTH AMENDMENT, PRIVACY AND ADVANCING TECHNOLOGY

Russell L. Weaver[*]

> A technological breakthrough in techniques of physical surveillance now makes it possible for government agents and private persons to penetrate the privacy of homes, offices, and vehicles; to survey individuals moving about in public places; and to monitor the basic channels of communication by telephone, telegraph, radio, television, and data line. Most of the 'hardware' for this physical surveillance is cheap, readily available to the general public, relatively easy to install, and not presently illegal to own.[1]

Following the American Revolution, when the new Americans demanded that the proposed constitution be amended to provide written guarantees against "unreasonable searches and seizures,"[2] they were motivated by a pattern of abuses during the colonial period. British colonial authorities had used writs of assistance that allowed them to do no more than specify the object of a search, and thereby obtain a warrant allowing them to search any place where the goods might be found,[3] without limit as to place or duration.[4] Colonial officials had also used "general warrants" that required them only to specify an offense, and then left it to the discretion of executing officials to decide which persons should be arrested and which places should be searched.[5] These British practices stirred up such a high level of anger among the colonists that it rapidly became clear that the proposed constitution would not be ratified without explicit protections against similar abuses (as well as in

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[*] Professor of Law & Distinguished University Scholar, University of Louisville, Brandeis School of Law. Professor Weaver wishes to thank the National Center for Justice and the Rule of Law, and in particular, Professor Thomas Clancy, for inviting him to participate in this symposium.

[1] ALAN F. WESTIN, PRIVACY AND FREEDOM, 365-66 (1967).

[2] The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[3] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 339-40 (2001) (noting that "the Framers or proponents of the Fourth Amendment, [were] outspokenly opposed to the infamous general warrants and writs of assistance . . . ."); Samson v. California, 547 U.S. 843, 858 (2006) ("The pre-Revolutionary 'writs of assistance,' which permitted

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roving searches for contraband, were reviled precisely because they 'placed the liberty of every man in the hands of every petty officer.'" (quoting Boyd v. United States, 116 U.S. 616, 625 (1886)); Virginia v. Moore, 553 U.S. 164, 168-69 (2008) ("The immediate object of the Fourth Amendment was to prohibit the general warrants and writs of assistance that English judges had employed against the colonists."); *see also* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 64 (3d ed. 2008).

[4] *See* Steagald v. United States, 451 U.S. 204, 220 (1981) ("[T]he writs of assistance used in the Colonies noted only the object of the search—any uncustomed goods—and thus left customs officials completely free to search any place where they believed such goods might be."); Gilbert v. California, 388 U.S. 263, 286 (1967) ("The practice had obtained in the colonies of issuing writs of assistance to the revenue officers empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.'") (quoting Boyd v. United States, 116 U.S. 616, 625 (1886)).

[5] *See* Virginia v. Moore, 553 U.S. 164, 168-69 (2008) ("The immediate object of the Fourth Amendment was to prohibit the general warrants and writs of assistance that English judges had employed against the colonists."); Steagald v. United States, 451 U.S. 204, 220 (1981) ("While the common law thus sheds relatively little light on the narrow question before us, the history of the Fourth Amendment strongly suggests that its Framers would not have sanctioned the instant search. The Fourth Amendment was intended partly to protect against the abuses of the general warrants that had occurred in England and of the writs of assistance used in the Colonies."); Payton v. New York, 445 U.S. 573, 608 (1980) ("In fact, it was the abusive use of the warrant power, rather than any excessive zeal in the discharge of peace officers' inherent authority, that precipitated the Fourth Amendment. That Amendment grew out of colonial opposition to the infamous general warrants known as writs of assistance, which empowered customs officers to search at will, and to break open receptacles or packages, wherever they suspected uncustomed goods to be."); *see* Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) ("The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists.").

protection of various other rights).[6] The demands culminated in the Bill of Rights, which provided protections for various rights, including the Fourth Amendment's prohibition against "unreasonable searches and seizures."[7]

The Framers of the Fourth Amendment could not have envisioned the extent to which technology would reshape society in the following centuries. Today, the effects of technology can be seen everywhere from health care (where technology allows doctors to treat patients located at distant places[8]), to telecommunications (where people can use systems like Skype to communicate cheaply over long distances at low cost[9]), and the changes have been revolutionary. For example, the communications industry, which was once dominated and controlled by large media corporations that possessed the money to purchase and operate printing presses or radio and television stations,[10] has seen its power and influence eroded by the development of personal computers (PCs), as well as the Internet.[11] Using Internet-based devices like listservs, blogs, Facebook, MySpace, Twitter and other communications technologies, ordinary people have been empowered to directly communicate with each other.[12] This revolution in speech technology has allowed ordinary people to shape and influence the political process, with far less censorship from media conglomerates.[13] Of course, the Internet has also released destructive forces in the sense that new speech technologies have also empowered various types of criminal conduct, including the distribution of child pornography,[14] sexual predation and child abuse,[15] and fraudulent schemes. The Internet has also been used by extremist groups to propagate hate speech[16] and Holocaust denial,[17] and has provided a haven for terrorists.[18]

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[6] *See* Maryland v. Garrison, 480 U.S. 79, 910 (1987) ("The Fourth Amendment, in fact, was a direct response to the colonists' objection to searches of homes under general warrants or without warrants."); *see* Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) ("[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." (quoting United States v. Chadwick, 433 U.S. 1, 7-8 (1977)); Boyd v. United States, 116 U.S. 616, 625 (1886) ("[T]he famous debate [and the anger] in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. . . . These things . . . were fresh in the memories of those who achieved our independence and established our form of government."); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) ("The driving force behind the adoption of the [Fourth] Amendment . . . was widespread hostility among the former colonists to the issuance of writs of assistance. . . . [T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government . . . .").

[7] U.S. CONST. amend. IV.

[8] *See* Laura Sydell, *Healing Rural Patients with a Dose of Broadband*, Nat'l Public Radio (Aug. 17, 2010), http://www.npr.org/templates/story/story.php?storyId=129178899.

[9] *See Morning Edition: Skype Has Big Piece of International Calling Pie*, Nat'l Public Radio (Jan. 20, 2010), http://www.npr.org/templates/story/story.php?storyId=122755197.

[10] *See generally* RUSSELL L. WEAVER, FROM GUTENBURG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY (forthcoming 2011).

Technological developments have also reshaped police surveillance techniques and created major doctrinal difficulties for courts in applying the Fourth Amendment. At the founding of the nation, police and other governmental agents did not have sophisticated spying and surveillance technologies at their disposal. Governmental agents might have tried to eavesdrop on their fellow citizens in taverns or other public settings, and might even have tried to listen outside of a suspect's window. However, without technology, the opportunities for successful eavesdropping were more limited. Today, eavesdropping and other surveillance technologies have gone high tech and created Orwellian possibilities for snooping.[19] As one commentator noted in 1974, "rapid technological advances and the consequent recognition of the 'frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society' have underlined the possibility of worse horrors yet to come."[20]

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[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (striking down portions of the Child Pornography Prevention Act of 1996 that prohibited "virtual" child pornography); Ferber v. New York, 458 U.S. 747 (1982) (upholding a New York criminal statute that prohibited individuals from knowingly promoting sexual performances by children under the age of sixteen years old).

[15] *See* Trymaine Lee, *Bill Would Bar Sex Offenders from Facebook and MySpace*, N.Y. TIMES, Jan. 30, 2008, at B4.

[16] *See* Russell L. Weaver, Nicholas Delpierre & Laurence Boissier, *Holocaust Denial and Governmentally Declared "Truth": French and American Perspectives*, 41 TEX. TECH L. REV. 495 (2009).

[17] *See* RICHARD E. HARWOOD, DID SIX MILLION REALLY DIE? (1974), *available at* http://www.ihr.org/books/harwood/dsmrd01.html; *see also* Raffi Berg, *The Fight Against Holocaust Denial*, BBC NEWS, Apr. 14, 2005, *available at* http://news.bbc.co.uk/1/hi/world/europe/4436275.stm.

[18] *See* Russell L. Weaver, *Brandenburg & Incitement in a Digital Era*, 80 MISS. L.J. (forthcoming Mar. 2011).

These potential "horrors" can be seen in the various surveillance technologies now available to the government. For example, the police can plant microphones in offices that allow them to overhear conversations from distant locations,[21] use devices that allow them to overhear conversations through walls,[22] and use super-sensitive microphones that allow them to overhear conversations through remotely placed technology.[23] Police can also utilize forward-looking infrared (FLIR) to monitor the amount of heat emanating from houses,[24] maintain closed-circuit television systems that allow them to continuously surveil public places,[25] use technology to detect speeding motorists (and send tickets to the speeders' homes),[26] use global positioning systems (GPS) that allow them to continuously monitor the location of individuals and things,[27] and have devices that allow them to overhear cell and cordless telephone conversations.[28] There is also X-ray technology that would allow police to peer through walls and into the privacy of homes using drive-by x-ray vans.[29] Moreover, as PCs and the Internet have come into common usage, devices now exist that permit the monitoring of key strokes and other computer uses,[30] and that allow one person to invade the privacy of a person's home and data from distant cyber sources through spyware technology.[31] As with listening devices, many of these devices can be purchased and used by ordinary individuals to spy on the movement of others[32] and to monitor what their neighbors or others are saying,[33] even from some distance away.[34]

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[19] *See* GEORGE ORWELL, 1984 (1949).

[20] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 386 (1974).

[21] *See* Katz v. United States, 389 U.S. 347, 348-49 (1967) (involving the attachment of an electronic listening device to the outside of a phone booth so that the police could overhear what was being said inside the phone booth).

[22] *See* Goldman v. United States, 316 U.S. 129, 131-32 (1942) (involving the use of a listening device that allowed the police to overhear what was being said in Goldman's office even though the police were located in an adjoining office).

[23] *See* Silverman v. United States, 365 U.S. 505, 506, 508-09 (1961) (discussing the fact that advanced surveillance technologies were already available in the 1960s).

[24] *See* Kyllo v. United States, 533 U.S. 27 (2001).

[25] *See* Dina Temple-Raston & Robert Smith, *Weekend Edition Sunday: U.S. Eyes U.K.'s Surveillance Cameras*, Nat'l Public Radio (July 8, 2007), http://www.npr.org/templates/story/story.php?storyId=11813693.

[26] *See* Ted Robbins, *Morning Edition: Intense Backlash Against Arizona Speed Cameras*, Nat'l Public Radio (Feb. 17, 2010), http://www.npr.org/templates/story/story.php?storyId=123501023.

The steady onslaught of technology has raised troubling implications for individual privacy. While various federal and state laws might be used to maintain and protect privacy, including anti-hacking[35] and anti-wiretapping laws,[36] an important bulwark against the government and the police has always been the Fourth Amendment to the United States Constitution.[37] While the Fourth Amendment has been interpreted to provide citizens with some protection against modern technologies,[38] early United States Supreme Court decisions dealing with technology and the Fourth Amendment tended to adhere to more traditional views of the Fourth Amendment and were virtually unresponsive (except in the dissents) to the problems presented by new technologies.[39] The Court's landmark decision in *Katz v. United States*[40] shifted the debate and attempted to come to grips with technology. And, indeed, the *Katz* decision was revolutionary in the sense that it cleanly broke from precedent and laid down a new approach for dealing with technological issues. While the *Katz* decision was perhaps not as significant as the Court's free speech decision in *New York Times Co. v. Sullivan*,[41] which one commentator viewed as "thrilling"[42] and another viewed as "an occasion for dancing in the streets,"[43] it has been recognized as a "seminal" decision.[44] Moreover, *Katz* offered substantial hope to those who were concerned about the advance of technology and the potential implications for privacy. However, *Katz* has not lived up to that promise for a variety of reasons, including the fact that the *Katz* test has been narrowly construed and has not easily adapted to new technologies.[45] This article examines the United States Supreme Court's handling of technology issues under the Fourth Amendment and the difficulties that the Court has encountered in trying to cope with the steady onslaught of technology.

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[27] *See* City of Ontario v. Quon, 130 S. Ct. 2610 (2010); Devega v. State, 689 S.E.2d 293 (Ga. 2010).

[28] *See* People v. Ledesma, 795 N.E.2d 253, 260-61 (Ill. 2003) (discussing a private individual's interception of a telephone conversation); Kimberly R. Thompson, *Cell Phone Snooping: Why Electronic Eavesdropping Goes Unpunished*, 35 AM. CRIM. L. REV. 137, 143-44 (1997).

[29] *See* Andy Greenberg, *Scanner Vans Allow Drive-By Snooping*, FORBES, (Sept. 27, 2010), *available at* http://www.forbes.com/forbes/2010/0927/technology-x-rays-homeland-security-aclu-drive-by-snooping.html; *see also* Rania M. Basha, Kyllo v. United States*: The Fourth Amendment Triumphs Over Technology*, 41 BRANDEIS L.J. 939, 939 (2003).

[30] *See* USA Spy Shop, Spy Software and Key Loggers, http://www.usaspyshop.com/spy-software-c-55.html (last visited Dec. 20, 2010) (listing computer spyware devices for sale).

[31] *See* Alan F. Blakley, Daniel B. Garrie & Matthew J. Armstrong, *Coddling Spies: Why the Law Doesn't Adequately Address Computer Spyware*, 25 DUKE L. & TECH. REV. 1 (2005), http://www.law.duke.edu/journals/dltr/articles/2005dltr0025.html; Jason Broberg, *From Calea to Carnivore: How Uncle Sam Conscripted Private Industry in Order to Wiretape Digital Telecommunications*, 77 N.D. L. REV. 795 (2001); Jayni Foley, *Are Google Searches Private? An Originalist Interpretation of the Fourth Amendment in Online Communication Cases*, 22 BERKELEY TECH. L.J. 447 (2007).

[32] *See* USA Spy Shop, GPS Tracking Devices, http://www.usaspyshop.com/gps-tracking-devices-c-118.html (last visited Dec. 20, 2010) (listing GPS systems for sale).

[33] *See* The Spy Zone, Listening Devices, http://www.spyzone.com/ccp0-display/listeningdevices.html (last visited Dec. 20, 2010).

[34] *See* Spy Shop, Super Ear / Sound Amplifier System, http://www.usaspyshop.com/sound-amplifier-system-p-472.html (last visited Dec. 20, 2010) (listing listening devices for sale).

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[35] *See* Mary M. Calkins, *They Shoot Trojan Horses, Don't They? An Economic Analysis of Anti-Hacking Regulatory Models*, 89 GEO. L.J. 171, 189 (2000).

[36] *See* Patricia L. Bellia, *Spyware and the Limits of Surveillance Law*, 20 BERKELEY TECH. L.J. 1283, 1289-90 (2005).

[37] U.S. CONST. amend. IV.

[38] *See* Kyllo v. United States, 533 U.S. 27, 34-35 (2001) (holding that the police may not use FLIR technology to ascertain the amount of heat emanating from a house (in order to determine whether the occupant was using special lights to grow marijuana in the attic) without a warrant); Katz v. United States, 389 U.S. 347, 353 (1967) (holding that the police committed a "search" within the meaning of the Fourth Amendment when they attached a listening device to the outside of a phone booth in order to overhear and record the contents of Katz's telephone conversation).

[39] *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928); *Ex parte* Jackson, 96 U.S. 727 (1877).

[40] 389 U.S. 347 (1967).

[41] 376 U.S. 254 (1964).

[42] Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment*," 83 COLUM. L. REV. 603, 625 (1983).

[43] Harry J. Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment*," 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn).

I. PRE-*KATZ* JURISPRUDENCE REGARDING TECHNOLOGY AND THE FOURTH AMENDMENT

As noted, when the Fourth Amendment was drafted and ratified, the state of surveillance technology was relatively crude and simplistic, and the ability of the government to pry into the lives of private citizens was much more circumscribed. As a result, the new Americans were focused on abuses committed by the British in using writs of assistance and general warrants, and they could hardly have envisioned the surveillance technologies that would be developed later. Since the new Americans were familiar with actual physical searches by British officials of their homes and persons, one would have expected them to define the term "search" in the way that it might have been defined then in ordinary parlance: a search would have involved an actual physical search of a particular place or person.[46]

For many years, the United States Supreme Court's definition of the term "search" tended to track common understandings.[47] As a result, most early Fourth Amendment decisions adopted a historical definition of the term "search" by focusing on people and places. If a person was searched, then the Fourth Amendment was implicated.[48] If a place was searched, the question was whether the government had intruded or trespassed into a "constitutionally protected area."[49] Thus, when the police broke into someone's house (a "constitutionally protected area") and rummaged through its contents, the Court had no difficulty concluding that the police had carried out a Fourth Amendment "search."[50] Likewise, when the police made an unauthorized entry into a car (once automobiles came into existence) to rummage through the trunk or seized an individual's briefcase to review its contents, the courts would likewise find that the police had conducted a search.[51]

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[44] *See* Amsterdam, *supra* note 20, at 383 ("[*Katz*] is, of course, now generally recognized as seminal and has rapidly become the basis of a new formula of fourth amendment coverage.").

[45] *See* Timothy Casey, *Electronic Surveillance and the Right to Be Secure*, 41 U.C. DAVIS L. REV. 977 (2008).

[46] *See* Draper v. United States, 358 U.S. 307 (1959).

[47] *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925); Hester v. United States, 265 U.S. 57, 59 (1924) (concluding that "the special protection accorded by the Fourth

Not until the early part of the twentieth century was the Court forced to consider the ramifications of modern technology and to think about whether the development of new technologies required a modification of the Court's definition of the term "search." In the cases that arose at that time, the Court tended to revert to the ideas that had (by that time) governed Fourth Amendment jurisprudence for nearly a century and a half. In other words, in deciding whether governmental officials had conducted a search, within the meaning of the Fourth Amendment, the Court focused on whether police or governmental officials had physically searched a person or had intruded or trespassed into a constitutionally protected area. However, in these early cases, there was an active debate between the Justices of the United States Supreme Court about whether the Court should adhere to its historical approach, or whether advances in technology demanded a new and different approach.

Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields").

[48] *See Draper*, 358 U.S. 307 (1959).

[49] *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928); *Ex parte* Jackson, 96 U. S. 727 (1877); *see also* Amsterdam, *supra* note 20, at 381.

[50] *See* Silverman v. United States, 365 U.S. 505, 511-12 (1961).

[51] *See, e.g.*, *Carroll*, 267 U.S. 132 (1925).

Illustrative of the Court's early technology holdings was the decision in *Olmstead v. United States*.[52] *Olmstead* involved an illegal conspiracy to buy and sell liquor, and evidence obtained through wiretaps about liquor orders by customers and acceptance of those orders. The wiretaps had been accomplished by attaching small wires alongside ordinary telephone wires outside of the residences of four of the suspects, as well as on the telephone line leading from their primary office.[53] In installing the wiretaps, governmental agents did not trespass on defendants' properties, but instead installed the taps in the basement of a large office building and on wires located in the streets outside of defendants' residences.[54]

In deciding the case, the *Olmstead* Court relied on its prior holding in *Carroll v. United States*,[55] and declared that the Fourth Amendment must be "construed in the light of what was deemed an unreasonable search and seizure when it [the Fourth Amendment] was adopted."[56] In the Court's view, the "well-known historical purpose of the Fourth Amendment" was to end general warrants and writs of assistance and "to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will."[57] As a result, in the Court's view, the focus was on "material things—the person, the house, his papers, or his effects,"[58] and therefore on whether there had been a "trespass" or an intrusion into a "constitutionally protected area." In light of this history, the Court held that the wiretaps did not involve a prohibited invasion of Olmstead's property or office.[59] Since the phone lines were used by defendants to project their voices outside of their homes and offices, and the police remained outside of those areas, the Court found no constitutionally prohibited intrusion.[60] In reaching those conclusions, the Court reverted to property principles,[61] and held that the intrusions were insufficient to have constitutional implications.[62] Finding no search within the meaning of the Fourth Amendment, the Court was not required to decide whether constitutionally required procedures had been satisfied.

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[52] 277 U.S. 438 (1928).

[53] *Id.* at 457.

[54] *Id.*

[55] 267 U.S. 132, 149 (1925).

[56] *Olmstead*, 277 U.S. at 465 (quoting *Carroll*, 267 U.S. at 149).

[57] *Id.* at 463.

[58] *Id.* at 464.

[59] *Id.* at 465 ("The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.").

Even in *Olmstead*, a few Justices were beginning to realize that the onslaught of technology might create substantial doctrinal difficulties for the Court's Fourth Amendment jurisprudence and were beginning to argue that the Court should adjust its approach to account for the encroaching effects of technology. Justice Brandeis, in particular, grasped the potentially adverse implications of technological innovation for personal privacy and argued that the Fourth Amendment should be given a broader interpretation in light of technological advances. Brandeis, relying on *McCulloch v. Maryland*[63] argued that, "'[i]n the application of a constitution . . . our contemplation cannot be only of what has been, but of what may be.'"[64] With some prescience, Brandeis noted that advances in technology could have a significant adverse effect on personal privacy: the "progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping," and "[w]ays may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."[65] He also expressed fear regarding the implications of advancing technology for personal freedom.[66] Based on these concerns, Justice Brandeis inquired, "Can it be that the Constitution affords no protection against such invasions of individual security?"[67]

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[60] *Id.* at 466 ("The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house. and messages while passing over them, are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.").

[61] *Id.* ("Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant, unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure.").

[62] *Id.* ("We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.").

[63] 17 U.S. (4 Wheat.) 316 (1819) ("[W]e must never forget that it is a Constitution we are expounding.").

[64] *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

Because of his concerns, Justice Brandeis tried to shift the Court's focus from constitutionally protected places to considerations of personal privacy. Relying on *Boyd v. United States*,[68] he argued that: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."[69] Brandeis also relied on the Court's holding in *Ex parte Jackson*,[70] which involved a sealed letter that had been sent through the U.S. mail and then opened by law enforcement officials. Brandeis saw no critical distinction between protecting a letter entrusted to the postal service and protecting a phone call made over phone lines: "'True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference.'"[71] Indeed, he argued that the invasion of privacy was greater when the police used wiretapping to overhear a conversation:

> The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the per-

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[65] *Id.*

[66] *Id.* (Brandeis stated a fear that "[a]dvances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. 'That places the liberty of every man in the hands of every petty officer.'" (quoting James Otis, In Opposition to Writs of Assistance, 5 (Feb. 1761)).

[67] *Id.*

[68] 116 U.S. 616, 627-30 (1886).

[69] *Olmstead*, 277 U.S. at 474-75 (Brandeis, J., dissenting) (quoting *Boyd*, 116 U.S. at 630).

[70] 96 U.S. 727 (1877).

[71] *Olmstead*, 277 U.S. at 475 (Brandeis, J., dissenting) (quoting the lower court, Olmstead v. United States, 19 F.2d 842, 850 (9th Cir. 1927)).

> sons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.[72]

For Brandeis, in reading the letter and in conducting the wiretap, the government had gone too far in examining the contents of communications.[73] Justice Butler also dissented in *Olmstead* and also argued for a more expansive interpretation of the Fourth Amendment. He noted that private telephones are used for many important purposes, and that the contracts between telephone companies and their customers contemplate private usage.[74] Since "communications belong to the parties between whom they pass," and "the exclusive use of the wire belongs to the persons served by it,"[75] he viewed wiretapping as a search within the meaning of the Fourth Amendment.[76] In his view, the Court "has always construed the Constitution in the light of the principles upon which it was founded,"[77] and "the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words."[78] In other words, the monitoring of telephone lines was equivalent to colonial officials rummaging through a house.

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[72] *Id.*

[73] *Id.* at 477-78.

> Decisions of this court applying the principle of the *Boyd* Case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office, or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it, and that use, in any criminal proceeding, of the contents of the paper so examined—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes a violation of the Fifth Amendment.

Id.

[74] *Id.* at 487 (Butler, J., dissenting) ("Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife.").

[75] *Id.*

[76] *Id.* ("Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.").

Similar fault lines were evident in the Court's decision in *Goldman v. United States*.[79] In that case, which followed *Olmstead*, defendants were charged with conspiracy to violate criminal provisions of the Bankruptcy Act. In the process of gathering evidence against petitioners, two federal agents surreptitiously gained access to Shulman's office (he was one of the defendants) with the assistance of the building superintendent.[80] They also managed to access the adjoining office where they installed a listening apparatus in a small aperture in the partition wall.[81] By means of the listening apparatus, the police hoped to overhear a meeting between Goldman and others set for the following afternoon.[82] When the apparatus did not work, the police decided to use a "detectaphone" to eavesdrop on the meeting.[83] The detectaphone, which was a delicate device that could be placed against the wall, had the capacity to detect sound waves from the next office and could amplify those waves so that they could be heard and understood in the next room. In other words, the device allowed police to eavesdrop on the meeting without actually entering the room. The police also used the device on later occasions to overhear other conversations in the adjoining office.[84] Using a stenographer, the police recorded and transcribed the conversations and sought to use them as evidence against Goldman.[85]

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[77] *Id.* at 487-88.

[78] *Id.* at 488.

[79] 316 U.S. 129 (1942).

[80] *Id.* at 131.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 131-32.

[85] *Id.*

Applying the same analysis that it had used in *Olmstead*, the Court held that the government's use of the detectaphone did not violate the Fourth Amendment. Although the police had trespassed into Goldman's office, the trespass occurred during the installation of a listening apparatus that was not used to overhear Goldman's conversations.[86] Instead, the spying had been accomplished by means of the detectaphone, which allowed the police to remain outside of Goldman's office but nevertheless to overhear the conversations without trespassing into or even entering the office. Because there was no trespass, the Court held that the Fourth Amendment was inapplicable even though the suspect spoke in his own office, and therefore, had an expectation of privacy regarding the contents of his conversations.[87]

A dissenting Justice Murphy argued for a more expansive interpretation of the Fourth Amendment, encouraged the Court to reconsider its approach to technological issues, and argued that police use of the detectaphone was a search within the meaning of the Fourth Amendment.[88] Relying on Justice Brandeis and Samuel Warren's seminal article on privacy,[89] he argued that the Fourth Amendment should be interpreted broadly to protect "the individual against unwarranted intrusions by others into his private affairs."[90] While Justice Murphy recognized that the literal language of the Fourth Amendment seemed to require a trespassory invasion, as a predicate to a finding of a search, and therefore might be construed as providing no protection to Goldman, he argued that "it has not been the rule or practice of this Court to permit the scope and operation of broad principles ordained by the Constitution to be restricted, by a literal reading of its provisions, to those evils and phenomena that were contemporary with its framing."[91] Noting that the "conditions of modern life have greatly expanded the range and character of those activities which require protection from intrusive action by Government officials if men and women are to enjoy the full benefit of that privacy which the Fourth Amendment was intended to provide," it is the Court's "duty to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation."[92]

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[86] *Id.* at 134-35.

[87] *Id.* at 135.

> The suggested ground of distinction is that the *Olmstead* case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the Constitutional guarantee and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the *Olmstead* case.

Id.

[88] *Id.* at 136-38 (Murphy, J., dissenting).

[89] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198-99 (1890).

For Justice Murphy, it mattered not that there had been no physical entry into Goldman's office since "science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment."[93] He argued that the Framers would have abhorred these new devices because they allowed governmental officials to invade privacy and intrude on intimate details, in various ways, "by placing on the outer walls of the sanctum a detectaphone that transmits to the outside listener the intimate details of a private conversation, or by new methods of photography that penetrate walls or overcome distances . . . ."[94] In addition, Justice Murphy regarded *Olmstead* as an aberration in the sense that prior decisions of the Court had "insisted on a liberal construction of the Fourth Amendment and placed within its compass activities bearing slight, if any, resemblance to the mischiefs known at the time of its adoption."[95] Justice Murphy also argued that *Olmstead* was distinguishable because Goldman and his co-conspirators did not intend to project their conversations beyond the walls of a private office, and therefore the use of the detectaphone constituted "a direct invasion of the privacy of the occupant, and a search of his private quarters."[96] He went on to argue that a free society must protect such communications against governmental surveillance.[97]

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[90] *Goldman*, 316 U.S. at 136 (Murphy, J., dissenting) ("But the Fourth Amendment puts a restraint on the arm of the Government itself and prevents it from invading the sanctity of a man's home or his private quarters in a chase for a suspect except under safeguards calculated to prevent oppression and abuse of authority.").

[91] *Id.* at 138.

[92] *Id.*

[93] *Id.* at 139.

[94] *Id.* at 139-40. He went on to argue that:

Olmstead and *Goldman* were followed by the holding in *Silverman v. United States*.[98] By the time that *Silverman* was decided, the Court was becoming acutely aware of the intrusive nature of new technologies. Indeed, in the briefs in that case, the parties had discussed devices such as "the parabolic microphone which can pick up a conversation three hundred yards away," experimental sound wave technology "whereby a room

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> Such invasions of privacy, unless they are authorized by a warrant issued in the manner and form prescribed by the Amendment or otherwise conducted under adequate safeguards defined by statute, are at one with the evils which have heretofore been held to be within the Fourth Amendment and equally call for remedial action.

Id. at 140.

[95] *Id.* at 141 n.8.

[96] *Id.* at 141.

[97] *Id.* at 142.

> The benefits that accrue from this and other articles of the Bill of Rights are characteristic of democratic rule. They are among the amenities that distinguish a free society from one in which the rights and comforts of the individual are wholly subordinated to the interests of the state. We cherish and uphold them as necessary and salutary checks on the authority of government. They provide a standard of official conduct which the courts must enforce. At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations surveillance that are restrictive and inadequate for the period in which we live.

Id.

[98] 365 U.S. 505 (1961).

is flooded with a certain type of sonic wave . . . mak[ing] it possible to overhear everything said in a room without ever entering it or even going near it," and an instrument "which can pick up a conversation through an open office window on the opposite side of a busy street."[99] However, the Court was able to sidestep a reexamination of *Olmstead* and *Goldman* by distinguishing those cases.

In *Silverman*, petitioners were convicted of gambling offenses based on their conversations that police overheard via an electronic listening device. The listening device was a so-called "spike mike" which included a microphone with a foot-long spike, an amplifier, a power pack, and earphones. Police officers inserted the spike under a baseboard in a second-floor room of the vacant house and into a crevice extending several inches into the party wall, until the spike hit something solid "that acted as a very good sounding board."[100] The record showed that the spike actually made contact with a heating duct in petitioners' house, and that the heating system served as a conductor of sound, allowing the police to overhear conversations on both floors of the house through the earphones. The officers used evidence obtained from the spike mike to obtain a search warrant from which they were able to obtain additional evidence.[101]

In distinguishing *Olmstead* and *Goldman*, the Court emphasized that the spike mike intruded into Silverman's home and created what the Court referred to as "an unauthorized physical penetration into the premises occupied by the petitioners."[102] Since the mike connected to the heating duct, it became "in effect a giant microphone, running through the entire house."[103] Given that there was a physical invasion of the premises, the Court regarded the case differently than *Goldman* (where the detectaphone had simply been held up against a wall)[104] and *Olmstead* (where there had been no physical trespass to the premises).[105] As a result, the Court concluded that "[e]avesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights."[106] The Court emphasized the importance of the home, and the protections provided to the home by the Fourth Amendment:

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[99] *Id.* at 508-09.

[100] *Id.* at 506.

[101] *Id.* at 507 n.1.

[102] *Id.*

[103] *Id.*

> The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.[107]

Even though the Court was able to decide *Silverman* using traditional Fourth Amendment tests, the Court was cognizant that the problem of advancing technology would soon require its attention.[108] In distinguishing *Olmstead* and *Goldman*, while the Court indicated that it need not decide the issue in that case, the *Silverman* Court suggested that it was well aware of "the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society."[109]

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[104] *Id.* at 510.

[105] *Id.* at 511.

[106] *Id.* at 509-10.

[107] *Id.* at 511-12.

[108] In *On Lee v. United States,* 343 U.S. 747 (1952), petitioner was convicted of selling opium based on two conversations that he had with an undercover agent who was wearing a small microphone that he used to transmit the conversations to the police. *Id.* at 747. Petitioner objected because one of the conversations took place at his place of business. *Id.* at 751-52. Nevertheless, the Court admitted the evidence, and rejected the argument that the Fourth Amendment had been violated:

> The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window.

Id. at 753-54.

II. *KATZ* AND THE "REASONABLE EXPECTATION OF PRIVACY" TEST

While the concepts of "trespassory invasions" and "intrusions into constitutionally protected areas" may have made sense as applied to a house, a car or a briefcase, those concepts did not produce satisfactory results as advancing technology provided police investigators with ever more sophisticated surveillance technologies. The holdings in *Olmstead*, *Goldman*, and *Silverman* reveal this fact. As a result, over time, it was perhaps inevitable that the Court would begin to take notice of the ideas articulated by the dissenters in *Olmstead* and *Goldman* and begin to formulate a new approach responsive to advancing technology. That happened in the Court's decision in *Katz v. United States*,[110] in which the Court finally formulated a new approach for defining the term "search" under the Fourth Amendment, particularly as that term is applied to technology.

Katz involved a man suspected of involvement in illegal bookmaking operations who placed a phone call from a telephone booth. Police, anticipating that Katz would make the call, placed an electronic bug on the outside of the booth which enabled them to record the conversation.[111] During the call, Katz made incriminating statements that were used against him in a subsequent prosecution. Relying on the Court's prior precedent, the government argued that the police did not engage in a "search" when they bugged the phone booth.[112] Since there was no "intrusion" into the phone booth, and there was doubt about whether the booth would be regarded as a "constitutionally protected area" anyway, it was not clear that the police had conducted a "search" within the meaning of the Fourth Amendment. Certainly, under the Court's prior precedent (e.g., *Olmstead*, *Goldman*, and *Silverman*), there was merit to the government's argument. The electronic bug placed by the police had done nothing more than passively collect sounds emanating from a public phone booth.

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[109] 365 U.S. at 509.

[110] 389 U.S. 347 (1967).

[111] *Id.* at 348.

[112] *Id.* at 352.

The Court disagreed with the government and held that police use of the listening device to overhear Katz's conversation constituted a "search" within the meaning of the Fourth Amendment.[113] In reaching that result, the *Katz* Court abandoned *Olmstead's* focus on whether there had been an "intrusion into a constitutionally protected area,"[114] and it also abandoned the requirement of a "trespass."[115] Instead, the Court focused on whether governmental officials had violated Katz's "expectation of privacy,"[116] and in doing so the Court explicitly claimed to shift its Fourth Amendment focus from places to persons.[117] As the Court stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[118] Justice Harlan, concurring, agreed with the Court that the focus should be on whether Katz had an expectation of privacy (EOP), but he argued that the expectation must be one that society was prepared to recognize as "reasonable."[119] Ultimately, Harlan's requirement of "reasonableness" was integrated into the EOP test so that the Court inquired whether the police had intruded upon an individual's "reasonable expectation of privacy" (REOP).

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[113] *Id.* at 353.

[114] *Id.* ("Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested.").

[115] *Id.* ("Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under . . . local property law.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))).

[116] *Id.* at 351-52.

[117] *Id.* at 351 ("For the Fourth Amendment protects people, not places.").

[118] *Id.* at 351 (citations omitted).

[119] *Id.* at 361 (Harlan, J., concurring).

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people.

Under the *Katz* approach, each case must be evaluated on its own facts.[120] In the *Katz* case itself, the Court concluded that government agents had conducted a "search."[121] By using the listening device to overhear Katz's private conversation, the police had intruded upon Katz's expectation of privacy.[122] Even though the police had not entered the booth, his expectations of having a private telephone conversation were thwarted by virtue of the fact that the listening device was used to listen to and record the contents of his conversation:

> The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is

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> Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Id.

[120] *Id.*

> Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id.

[121] *Id.* at 353.

[122] *Id.*

> surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.[123]

In *Bond v. United States*,[124] as well as in other later decisions,[125] the Court interpreted the *Katz* formulation as requiring proof of two things in order to establish a search. First, "whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that 'he [sought] to preserve [something] as private.'"[126] Second, "whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable.'"[127] Only if these two questions are answered in the affirmative would the Court conclude that there had been a search within the meaning of the Fourth Amendment.

III. POST-*KATZ* PRECEDENT AND APPLICATION OF THE REOP TEST

When it was initially decided, *Katz* might have been regarded as a hopeful decision for individual freedom and as a viable platform for dealing with the immense problems presented by advancing technology, problems that had perplexed the Court for decades. The REOP concept had the potential to reshape Fourth Amendment jurisprudence and provide substantial protection to individuals against the potential intrusions of modern technology. If the concept of a "reasonable expectation of privacy" was expansively construed, many more types of governmental actions might be regarded as "searches" within the meaning of the Fourth Amendment, including many new and developing forms of technology. As a result, these activities would be subject to the Fourth Amendment reasonableness limitation, and police would have to comply with Fourth Amendment procedures when a warrant was required. Indeed, in the *Katz* decision itself, the Court used the REOP test to treat police activity as a search in a context that would not have been regarded as a search under the Court's pre-*Katz* precedent. As a result, some commentators tended to view *Katz* as a decision that would enhance the protection of individual privacy.[128]

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[123] *Id.* at 352.

[124] 529 U.S. 334 (2000).

[125] *See* Minnesota v. Carter, 525 U.S. 83 (1998); Smith v. Maryland, 442 U.S. 735, 740 (1979).

[126] *Bond*, 529 U.S. at 338 (quoting *Smith*, 442 U.S. at 740 (1979)).

[127] *Id.*

Although there have been some hopeful statements in recent decisions regarding the meaning of the REOP test, the jury is still out regarding the significance and worth of that test. As it has been interpreted and applied thus far, it is far from clear that *Katz* established a sound framework for Fourth Amendment analysis, or for dealing with the implications of advancing technology. Post-*Katz* decisions continued to reveal many of the fault lines evident in the Court's pre-*Katz* Fourth Amendment jurisprudence as some Justices viewed the *Katz* test expansively and aspirationally, in the spirit of the Brandeis, Butler, and Murphy dissents in *Olmstead* and *Goldman*, whereas other Justices viewed the *Katz* test more narrowly and restrictively. These fault lines were particularly evident when the Court tried to apply the test to new forms of technology. However, the fault lines were also evident even in situations when the Court sought to apply the REOP test in other contexts. The Court simply did not develop a workable framework for determining whether a REOP exists, or for determining how the REOP test should be applied to new technologies.

Perhaps the problem with the *Katz* test lies with the nature of the test itself. In *Katz*, the Court decided to use case-by-case analysis by creating a vague standard—reasonable expectation of privacy—that had to be applied to the facts of individual cases.[129] The test itself is necessarily vague and did not provide precise direction or guidance to later courts.[130] Although it is possible to produce a rational, well-defined and consistent body of doctrine under a case-by-case approach, a body of doctrine usually emerges and develops over time from a well-considered set of decisions. In that way, vague terms like "reasonableness" and "expectation of privacy" gain content and meaning. The difficulty is that the development of a case-by-case approach is affected by who (which judges or justices) is applying the test, and how they are developing its meaning. If Justices view the REOP test narrowly, then the test will not provide much protection for individual privacy and will not provide much of a barrier against the intrusions of modern technology. On the other hand, if the judges view the REOP test aspirationally in the sense of trying to envision how the scope of privacy should be viewed in a free society, as Justice Brandeis and Justice Murphy did in their *Olmstead* dissents,[131] and Justice Murphy did in his *Goldman* dissent,[132] then the test takes on a quite different meaning and can have different implications for the protection of individual privacy.

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[128] *See* Amsterdam, *supra* note 20, at 385 ("As a doctrinal matter, it seems clear that the effect of *Katz* is to expand rather than generally to reconstruct the boundaries of Fourth Amendment protection.").

[129] I do not mean suggest that a bright-line rule would have been preferable in this area of the law. For one thing, it is not entirely clear how the Court could have formulated a bright-line rule that would have been effective, and that would have provided future courts with clear guidance regarding how to handle new forms of technology.

The REOP test has borne limited fruit because of the circumstances under which it has been applied. The test was created during the Warren Court era, a period when the Court tended to view the Fourth Amendment more expansively, as it

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The Court has articulated bright-line rules in various contexts, including the right to counsel cases, *see, e.g.*, Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (providing that the right to counsel applies when a criminal defendant has received a penalty of actual imprisonment), and the privilege against self-incrimination cases. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (requiring police to administer a *Miranda* warning before engaging in custodial interrogation of a suspect). However, the "bright-line" rules articulated in those cases have not always been so bright, or clear, and have themselves produced judicial uncertainty. For example, the *Miranda* decisions (establishing rules governing custodial interrogations of suspects) have produced much litigation regarding various aspects of the *Miranda* warnings. The Court has, for example, struggled to define and apply the various components of the *Miranda* test. *See* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, RONALD J. BACIGAL, JOHN M. BURKOFF, CATHERINE HANCOCK & JANET C. HOEFFEL, CRIMINAL PROCEDURE: CASES, PROBLEMS AND EXERCISES 482-552 (4th ed. 2010). It has also struggled with issues relating to the right to counsel.

[130] *See, e.g.*, Amsterdam, *supra* note 20, at 383 (suggesting perspectives on how a REOP should be ascertained).

[131] *See supra* notes 64-78 and accompanying text.

[132] *See supra* notes 88-97 and accompanying text.

did other criminal procedure protections,[133] but was interpreted and defined by the Burger Court and Rehnquist Court, which had a tendency to be less protective in the criminal procedure arena generally.[134] Indeed, both the Burger Court and Rehnquist Court imposed a number of restrictions on the rights of criminal defendants in such diverse areas as ineffective assistance of counsel,[135] the exclusionary rule,[136] and the definition of probable cause.[137] Understandably, the Burger Court and the Rehnquist Court did not tend to view *Katz's* REOP test expansively and did not construe that decision as being particularly protective of either privacy, specifically, or of Fourth Amendment rights in general.[138] In addition, early Burger Court and Rehnquist Court decisions did not provide much hope that the REOP test could adequately deal with the implications of advancing technology.

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[133] *See, e.g.*, Camara v. Mun. Court, 387 U.S. 523 (1967) (holding that administrative inspections are subject to Fourth Amendment requirements and protections); Miranda v. Arizona, 384 U.S. 436 (1966) (requiring that criminal suspects be given a *Miranda* warning before being subjected to custodial interrogation); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (according indigent defendants, in state court criminal proceedings, the right to state-provided attorneys); Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (extending the exclusionary evidence rule to state court proceedings).

[134] *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655-56 (1984) (creating a "public safety" exception to *Miranda*); United States v. Janis, 428 U.S. 433, 459-60 (1976) (allowing the government to use illegally obtained evidence in a civil proceeding).

[135] *See* Strickland v. Washington, 466 U.S. 668, 688-89 (1984) (creating standards for assertion of ineffective assistance of counsel claims that make it difficult for convicts to prevail).

[136] *See* United States v. Leon, 468 U.S. 897, 906-08 (1984) (restricting the exclusionary evidence rule by establishing a good-faith exception and subjecting the rule to cost-benefit analysis).

[137] *See* Illinois v. Gates, 462 U.S. 213, 238 (1983) (altering the probable cause requirement).

[138] *See, e.g.*, Florida v. Riley, 488 U.S. 445, 445-46 (1989) (allowing police to fly a helicopter at low altitude over the curtilage of Riley's property for surveillance purposes); California v. Greenwood, 486 U.S. 35, 39-41 (1988) (holding that Greenwood did not have a REOP as to trash left in front of his house for trash collectors to retrieve); California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (holding that police could fly a helicopter at low altitude over Ciraolo's property for surveillance purposes); United States v. Knotts, 460 U.S. 276, 281-82 (1983) (allowing police to use an electronic beeper to track Knott's movements); Rakas v. Illinois, 439 U.S. 128, 148-49 (1978) (holding that a passenger in a vehicle did not have a REOP as to items found in the vehicle).

As one analyzes the Court's post-*Katz* decisions, it becomes clear that *Katz* protects individuals against certain types of intrusions. For example, absent unusual circumstances, the Court would find a REOP (and, therefore, a search) if the police break into a private home and search it from top to bottom,[139] or they search an individual,[140] a passenger's luggage[141] or an owner's vehicle.[142] For example, in *Safford Unified School District #1 v. Redding*,[143] the Court easily found a violation of a high-school student's REOP when school officials subjected her to a strip search[144] and also searched her backpack.[145] Likewise, in *Winston v. Lee*,[146] the Court held that a

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[139] *See, e.g.*, Georgia v. Randolph, 547 U.S. 103 (2006); Groh v. Ramirez, 540 U.S. 551 (2004); *see* Payton v. New York, 445 U.S. 573, 585 (1980) (suggesting that searches of the home were one of the primary evils at which the Fourth Amendment was directed).

[140] *See, e.g.*, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2637 (2009) (strip search of a high school student); Terry v. Ohio, 392 U.S. 1, 29-31 (1968) (holding that a police officer's frisk of Terry constituted a search within the meaning of the Fourth Amendment, albeit a reasonable one).

[141] *See, e.g.*, Florida v. Royer, 460 U.S. 491, 498-508 (1983) (holding that police intrusion into the contents of baggage constitutes a search within the meaning of the Fourth Amendment); *see also* Bond v. United States, 529 U.S. 334, 338-39 (2000) (a search was committed when police physically manipulated Bond's bag in order to ascertain the nature of its contents).

[142] *See, e.g.*, Arizona v. Gant, 129 S. Ct. 1710 (2009) (holding that a search occurs when the police search a vehicle incident to an arrest); California v. Acevedo, 500 U.S. 565 (1991) (discussing the rules applicable to automobile searches); New York v. Class, 475 U.S. 106, 112-13 (1986) (holding that a police officer committed a search, within the meaning of the Fourth Amendment, when he entered a vehicle to move papers (so that he could see the vehicle's Vehicle Identification Number) and happened to see a weapon).

[143] 129 S. Ct. 2633 (2009).

[144] *Id.* at 2641.

> The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Id.

[145] *Id.* at 2641 n.3.

> There is no question here that justification for the school officials' search was required in accordance with the *T.L.O.* standard of reasonable suspicion, for

governmental attempt to force an individual to submit to surgery to remove a bullet (which would have provided evidence regarding his involvement in an attempted robbery) would constitute a search within the meaning of the Fourth Amendment. However, these factual scenarios are hardly cutting-edge, and they do not involve the use of sophisticated technologies. Moreover, all of these scenarios are explicitly protected under the literal language of the Fourth Amendment, which provides protection for persons, papers, houses and effects,[147] and one might guess that the Court would have found that a search had been committed in these situations even under its pre-*Katz* precedent. All involved either searches of persons, or searches of "constitutionally protected areas," and all would have received protection under decisions like *Olmstead*, *Goldman*, and *Silverman*.

In order to fairly assess *Katz*'s impact on Fourth Amendment jurisprudence, it is necessary to look at other contexts in which the REOP test has been defined and is especially important to ascertain how the test has been applied to new forms of technology. When analyzed in this way, it is difficult to argue that the *Katz* test has dramatically reshaped the Court's approach to search issues, or for that matter has provided much additional protection for privacy interests, and it is far from clear that the REOP test provides a sound basis for addressing issues related to new forms of technology. The limited nature of the test's impact is belied by the nature of the *Katz* decision

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> it is common ground that Savana had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack and that Wilson's decision to look through it was a "search" within the meaning of the Fourth Amendment.

Id. (citation omitted).

[146] 470 U.S. 753, 766 (1985).

[147] In another not terribly surprising decision, *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court concluded that a prisoner did not have a REOP in his prison cell. *Id.* at 525-26. The case arose when prison officials did a shakedown of an inmate's cell for contraband, discovered a ripped pillow case, and disciplined the prisoner for destroying state property. *Id.* at 519. Noting that imprisonment brings with it the loss of various rights, the Court was unwilling to recognize that prisoners had legitimate expectations of privacy in their cells. *Id.* at 527-28. In addition, the Court emphasized the security needs of penal institutions. *Id.*

itself, which seemed to offer a new approach to, and a way to deal with, the problem of new technologies. The concern is whether *Katz* is the exception (with a few other exceptions that will be noted below) in this line of precedent which proves *Katz*'s lack of impact.

Looked at in its entirety, including the bulk of United States Supreme Court cases construing *Katz*, the Court has construed the REOP test rather narrowly in the sense that there are few cases when the Court has found that a REOP exists when it would not have found a search under its pre-*Katz* precedent. In a number of cases, the Court has concluded either that there was no REOP (and, therefore, no search) in the particular case before the Court, or the Court has held that defendants did not have standing to assert Fourth Amendment rights because they lacked a REOP. In only a few limited situations has the Court expanded the definition of a search beyond its pre-*Katz* limits. As a result, for those who harbored hope that *Katz* would expand Fourth Amendment jurisprudence, and might provide a bulwark against advancing technology, those hopes have not been fully realized thus far.

*A. Post-*Katz *Standing Decisions*

The limited impact of the REOP test is illustrated by the Court's decisions regarding standing to assert Fourth Amendment rights. The standing decisions are an important indicator of *Katz*'s meaning because the Court has applied the REOP test in determining whether an individual has standing to litigate a Fourth Amendment claim, as well as because they indicate the scope and content of a REOP. However, the Court has restrictively construed the REOP test in those decisions, which reveal many of the fault lines that were evident in the Court's pre-*Katz* precedent.

Passengers in Automobiles. Even though *Katz* purported to abandon the property-based distinctions that prior decisions had relied on, including the concepts of trespass and constitutionally protected areas, the Court has had difficulty developing secure moorings for the REOP test apart from property principles. For example, in *Rakas v. Illinois*,[148] the Court considered whether a passenger in a vehicle had standing to challenge a search of that vehicle.[149] Under the Court's pre-*Katz* precedent, specifically *Jones v. United States*,[150] Rakas could have established standing on the basis that the search was "directed" at him, or on the basis that he was "legitimately on [the] premises" (in this case, more precisely, in the vehicle) at the time of the search. In *Rakas*, the Court held that *Katz* and the REOP test should be used to determine whether Rakas had standing to challenge the search rather than the property principles that had previously been used.[151] However, the Court did not provide novel content to the REOP test, but instead seemed to revert to property principles in deciding whether a REOP existed. In concluding that Rakas did not have standing, the Court emphasized that Rakas did not have a property or possessory interest in the vehicle, or interest in the property seized.[152] The Court held that a passenger in the vehicle would have no expectation of privacy in the places the contraband was found (under the car seat and in the glove compartment).[153] The Court declined to apply *Jones*, which it distinguished, noting that Jones was in an apartment by himself with a key and had the right to exclude others. Therefore, he had a REOP in the apartment even though he did not own or hold a possessory interest in the apartment.[154]

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[148] 439 U.S. 128 (1978).

[149] *Id.* at 143.

[150] 362 U.S. 257 (1960).

[151] *Rakas*, 439 U.S. at 143 (citations omitted).

> *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place . . . . *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law.

Id.

[152] *Id.* at 148.

[153] *Id.* at 148-49.

The *Rakas* interpretation of the REOP test was hardly expansive, and a dissenting Justice White challenged what he regarded as the Court's fairly narrow conception of REOP. He argued that a passenger has a REOP in a vehicle in which he is riding: "[S]urely a person riding in an automobile next to his friend the owner, or a child or wife with the father or spouse, must have some protection . . . ."[155] Even though *Rakas* did not have an ownership interest or a possessory interest in the vehicle, Justice White contended that he had an interest in protecting his "personal freedom from unreasonable governmental intrusion."[156] Justice White's more serious complaint was that, even though the *Katz* Court purported to abandon property principles in favor of the REOP test, the Court considered only property principles in determining whether Rakas' REOP had been invaded.[157] In his view, the Court construed the REOP test too narrowly and "contrary . . . to the everyday expectations of privacy that we all share."[158]

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[154] *Id.* at 149.

[155] *Id.* at 166 (White, J., dissenting).

[156] *Id.* at 164-65, 166.

> [T]he Court asserts that it is not limiting the Fourth Amendment bar against unreasonable searches to the protection of property rights, but in reality it is doing exactly that. Petitioners were in a private place with the permission of the [owner]. . . . [I]f that is not sufficient, what would be? . . . [I]t is hard to imagine anything short of a property interest that would satisfy the majority. Insofar as the Court's rationale is concerned, no passenger in an automobile, without an ownership or possessory interest and regardless of his relationship to the owner, may claim Fourth Amendment protection against illegal stops and searches of the automobile in which he is rightfully present.

Id.

[157] *Id.* at 166-67. He went on to note that:

> The Court's reliance on property law concepts is additionally shown by its suggestion that visitors "could content the lawfulness of the seizure of evidence or the search if their own property were seized during the search." What difference should that property interest make to constitutional protection against unreasonable searches, which is concerned with privacy? . . . [A] legitimate passenger in a car expects to enjoy the privacy of the vehicle whether or not he happens to carry some item along for the ride. We have never before limited our concern for a person's privacy to those situations in which he is in possession of personal property. Even a person living in a barren room without possessions is entitled to expect that the police will not intrude without cause.

Peering Through Drawn Window Blinds. The Court followed *Rakas* with its decision in *Minnesota v. Carter*[159] and again adopted a fairly narrow view of the REOP test. In that case, while Carter and the lessee of an apartment were inside the apartment, a police officer peered through a drawn window blind and saw them bagging cocaine.[160] In holding that Carter did not have a REOP in the apartment, the Court relied on *Rakas*, and its property-based analysis, and focused on whether Carter had a sufficient interest in the place being searched to allow him to challenge the officer's decision to peer through the window.[161] Although the Court paid lip service to *Katz* and the idea that the Fourth Amendment protects people rather than places, it emphasized that the "extent to which the Fourth Amendment protects people may depend upon where those people are," and whether the person has a "legitimate expectation of privacy in the invaded place."[162] Since Carter was not the lessee of the apartment, and was in the apartment solely to conduct a business transaction,[163] the Court concluded that his expectation of privacy in this "business property" (the court treated the apartment as a business property because Carter

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Id. at 167 n.142 (citations omitted).

[158] *Id.* at 167.

[159] 525 U.S. 83 (1998).

[160] *Id.* at 85.

[161] *Id.* at 87-88; *see Rakas*, 439 U.S. at 143-44, & n.12 (majority opinion).

[162] 525 U.S. at 88.

> [I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.,* one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Id. (quoting *Rakas*, 439 U.S. 128, 143 n.12 (1978)).

[163] *Id.* at 89 ("While the apartment was a dwelling place for Thompson, it was for these respondents simply a place to do business.").

was there to conduct business) was much lower,[164] and therefore, he had no REOP in the apartment.[165]

As with the decision in *Rakas*, the Court's interpretation of the REOP standard in Carter was relatively narrow, and some Justices argued that the Court should adopt a more expansive interpretation of the REOP test. Justice Kennedy concurred in *Carter*, but argued that "almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home."[166] Justice Ginsburg, joined by Justices Stevens and Souter, dissented, and argued that Carter had a REOP in the premises regardless of whether he was engaged in a business transaction.[167] She was willing to find a REOP whenever a homeowner (or lessee) personally invites someone into his/her home for any reason,[168] and therefore allows the visitor to share his "protection against unreasonable searches and seizures."[169] She also rejected the argument that it mattered whether the guest entered the home to conduct a business transaction, noting that *Katz* involved an individual who made a business call from a phone booth, but was nonetheless regarded as having a REOP regarding the contents of the call.[170] Justice Ginsburg saw no meaningful difference between *Carter* and *Katz*.[171]

Search of Another Person's Purse (containing the defendant's personal property). Rakas was also followed by a similar holding in *Rawlings v. Kentucky*.[172] In that case, Rawlings hastily stashed LSD tablets and other illegal drugs in Cox's purse as the police arrived at a house to conduct a search. Cox emptied her purse, in response to a police command, and then told Rawlings "to take what was his."[173] Rawlings claimed ownership of the controlled substances, and was arrested for possession of the controlled substances recovered from Cox's purse. When he sought to suppress the evidence, the Court concluded that Rawlings expectation of privacy was not infringed by the police actions, and therefore there was no search as to him.[174] The Court emphasized that Rawlings had known Cox for only a few days, had never been given access to her purse before, did not claim the right to exclude others from the purse, and had placed the drugs in the purse quickly in a way which suggested that he had no privacy rights.[175] In addition, Rawlings had even denied that he had a subjective expectation in the purse.[176] The Court held that Rawlings' ownership of the drugs was insufficient to give him an expectation of privacy in the purse, noting that "arcane" property concepts do not control Rawlings' right to claim Fourth Amendment protections.[177]

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[164] *Id.* at 90-91.

[165] *Id.* at 89.

[166] *Id.* at 101 (Kennedy, J., concurring).

[167] *Id.* at 106 (Ginsburg, J., dissenting).

[168] *Id.* at 106-07. For Justice O'Connor it did not matter whether the guest was admitted "for conversation, to engage in leisure activities, or for business purposes licit or illicit . . . ." *Id.* at 106.

[169] *Id.* at 109. Of course, in her view, the guest's expectation would only extend to the parts of the house to which he/she had been admitted, and the expectation would not include the likes of a "milkman or pizza deliverer." *Id.*

[170] *Id.* at 111.

[171] *Id.* at 111-12 ("I do not agree that we have a more reasonable expectation of privacy when we place a business call to a person's home from a public telephone booth on the side of the street than when we actually enter that person's premises to engage in a common endeavor." (citations omitted)).

[172] 448 U.S. 98 (1980).

Once again, some Justices argued for a more expansive interpretation of the REOP test, and questioned the Court's decision. In dissent, Justice Marshall, joined by Justice Brennan, noted that the Fourth Amendment explicitly protects not only persons, houses and papers, but also "effects."[178] He argued that Rawlings' ownership of the "effects" (the drugs) should have given him standing to challenge the search[179] because the Fourth Amendment does not protect only people and places.[180]

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[173] *Id.* at 98.

[174] *Id.* at 104-06.

[175] *Id.* at 104-05.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 117-18 (Brennan, J., dissenting).

> The Fourth Amendment, it seems to me, provides in plain language that if one's security in one's "effects" is disturbed by an unreasonable search and seizure, one has been the victim of a constitutional violation; and so it has always been understood. Therefore the Court's insistence that in order to challenge the legality of the search one must also assert a protected interest in the premises is misplaced. The interest in the item seized is quite enough to establish that the defendant's personal Fourth Amendment rights have been invaded by the government's conduct.

Id.

The bottom line is that, as the REOP test has been interpreted and applied in the standing decisions, *Katz* did not have the effect of expanding Fourth Amendment protections. From the perspective of standing issues, the *Katz* decision clearly had a negative effect. Under the Court's pre-*Katz* precedent, particularly the Court's standing decision in *Jones*, both *Rakas* and *Carter* could have established standing to challenge the searches. Under *Katz*, the Court altered its standing jurisprudence to focus on whether Rakas had a REOP in the vehicle, construed the concept of a REOP narrowly, and concluded that Rakas did not possess a REOP.[181] In addition, *Rakas* and *Carter* focused on property principles, and chose to construe the REOP test narrowly. For those who had hoped that the REOP test would provide expanded protections against privacy, or a way to deal with the encroachments of modern technology, none of the decisions offered much hope.

B. Katz *and the Court's Non-Technology Decisions*

Katz's meaning is also revealed by the Court's non-technology decisions applying the REOP test. Although the Court has found a REOP in some of these cases, many decisions involved factual patterns where the Court's pre-*Katz* jurisprudence would have found a search as well.[182] In the post-

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[179] *Id.* at 115.

[180] *Id.* at 117.

> The Court's decision today is not wrong, however, simply because it is contrary to our previous cases. It is wrong because it is contrary to the Fourth Amendment, which guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Court's reading of the Amendment is far too narrow. The Court misreads the guarantee of security "*in* their persons, houses, papers, and effects, *against* unreasonable searches and seizures" to afford protection only against unreasonable searches and seizures *of* persons and places.

Id.

[181] *See supra* notes 151-58 and accompanying text.

[182] *See* discussion *supra* notes 55-62, 79, 90-97 and accompanying text.

Katz era, the Court did decide some cases involving novel applications of the REOP test, and these cases offer much insight into how the Court defines the REOP test, as well as into whether the REOP test will provide much protection against advancing technology. The results suggest that *Katz* did not have a major impact on the Court's definition of the term "search."

Open Fields. In *Oliver v. United States*,[183] the Court had a straightforward opportunity to demonstrate that the REOP test would produce different results than had been produced under the Court's prior tests. In its pre-*Katz* decision in *Hester v. United States*,[184] the Court held that police examination of "open fields" does not constitute a "search" within the meaning of the Fourth Amendment.[185] In *Oliver*, the Court had ample grounds for concluding that a REOP could exist, even in open fields, and therefore for overruling *Hester*. Oliver's farm was located in a secluded area bounded by woods, fences (some of which had locked gates), and embankments, and was posted with "No Trespassing" signs.[186] Government agents, who did not have a warrant to search the property, followed a footpath to the side of the gate and entered the field.[187] At one point, a man yelled at the officers that "No hunting is allowed" and demanded that they leave.[188] When the agents responded that they were police, the man disappeared.[189] Deep in the property, about a mile from Oliver's home, the officers found a field that contained marijuana.[190] Oliver was eventually convicted of manufacturing a controlled substance.

In deciding the case, the Court decided to reaffirm *Hester* and its pre-*Katz* jurisprudence. The Court observed that the Fourth Amendment explicitly protects "persons, houses, papers, and effects," and says nothing about protecting "open fields,"[191] and the Court viewed the distinction between open fields and houses as being as "old as the common law."[192] Moreover, even though there was no indication that anyone could view the secluded fields from surrounding properties, the Court held that open fields can sometimes be viewed from public places, notwithstanding the presence of "No Trespassing" signs,[193] and that any expectation of privacy that Oliver might have held in his fields is not one that society was prepared to recognize as "reasonable."[194]

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[183] 466 U.S. 170 (1984).

[184] 265 U.S. 57 (1924).

[185] *Id.* at 59.

[186] *Oliver*, 466 U.S. at 173-74.

[187] *Id.* at 173 & n.1.

[188] *Id.* at 173.

[189] *Id.*

[190] *Id.*

Consistent with its pre-*Katz* jurisprudence, the *Oliver* Court distinguished "open fields" from the "curtilage" immediately surrounding the home," and suggested that "the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" and therefore is the part that deserves protection under the Fourth Amendment.[195] In the Court's opinion, it mattered not that the police had trespassed onto the fields.[196] In addition, the Court doubted that an individual could hold a REOP in open fields outside the curtilage of his house,[197] in part because individuals do not conduct "intimate activities" in such places, and the Court expressed doubt about whether the Fourth Amendment was "intended to shelter from government interference or surveillance" such activities as crop cultivation.[198]

In *Oliver*, several Justices argued for a more expansive interpretation of the REOP test. Justice Marshall, joined by Justices Brennan and Stevens, dissented, forcefully arguing that the Court had misapplied the REOP test.[199] In his view, several factors suggested that Oliver's expectation of privacy was reasonable, noting that Oliver owned the land,[200] that it was protected by the law of trespass,[201] that it was not exposed to public view, that it might have been used for some quite intimate purposes,[202] and Oliver took steps to maintain his privacy, including the posting of "no trespassing" signs.[203] He concluded with the observation that the "Fourth Amendment, properly construed, embodies and gives effect to our collective sense of the degree to which men and women, in civilized society, are entitled 'to be let alone' by their governments,"[204] and he would have held that the police had committed a search within the meaning of the Fourth Amendment.[205]

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[191] *Id.* at 171 (quoting Hester v. United States, 265 U.S. 57, 59 (1924)).

[192] *Id.* at 176 (quoting *Hester*, 265 U.S. at 59).

[193] *Id.* at 179.

[194] *Id.*

[195] *Id.* at 180 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[196] *Id.* at 182-84.

[197] *Id.* at 178.

[198] *Id.* at 179. The Court went on to state that: "Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement." *Id.* at 182-83.

Interestingly, the Court later departed from parts of the *Oliver* decision in its holdings in *California v. Ciraolo*[206] and *Florida v. Riley*.[207] In *Oliver*, the Court placed great emphasis on the idea of protecting the curtilage surrounding a home, and the expectations of privacy associated with the curtilage, but held that Oliver was growing the marijuana outside of the curtilage of his home. In *Ciraolo* and *Riley*, the Court held that there was no search when the police flew a helicopter over property at low altitudes to examine the curtilage of property.

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[199] Indeed, he argued that a determination of whether a REOP existed should have depended on consideration of three factors:

> First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect.

Id. at 189 (Marshall, J., dissenting).

[200] *Id.* at 190.

[201] *Id.* at 190-91.

[202] *Id.* at 192-93.

[203] *Id.* at 193.

[204] *Id.* at 197.

[205] *Id.* at 195. Thus, Justice Marshall argued that "[p]rivate land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures." *Id.*

[206] 476 U.S. 207, 213-14 (1986).

[207] 488 U.S. 445, 449-51 (1989).

Garbage Collection. The Court had another chance to apply the REOP test in a novel context in *California v. Greenwood.*[208] That case involved the question of whether the police conducted a search when they examined the Greenwoods' garbage. The case began when police received information suggesting that the Greenwoods might be involved in illegal narcotics trafficking.[209] After some investigation, an officer asked the Greenwoods' trash collector to turn their trash over to them without mixing it with Greenwoods' neighbors' trash.[210] The officer searched the bags and found evidence of narcotics use.[211] Later, police worked with the trash collector again and turned up additional evidence.[212] Based on the evidence, police obtained and executed a search warrant for the Greenwoods' house, which revealed quantities of cocaine and hashish.[213]

Greenwood presented the Court with a clear opportunity to show that the REOP test had impact beyond the *Katz* scenario that "[s]crutiny of another's trash is contrary to commonly accepted notions of civilized behavior,"[214] and that "members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public."[215] Plus, a trash bag is a common repository for personal effects[216] and noted that many cities prohibit the practice.[217]

The Court approached the REOP test with a very different sort of analysis, concluding that the Greenwoods did not hold a REOP in their trash.[218] While the trash was lying by the curb, it was accessible to "animals, children, scavengers, snoops, and other members of the public"[219] and the trash had been placed by the curb "for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so."[220] As a result, since the Greenwoods placed the trash by the curb "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," the Court concluded that the Greenwoods could not have maintained a "reasonable expectation of privacy in the inculpatory items that they discarded."[221]

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[208] 486 U.S. 35 (1988).

[209] *Id.* at 37-38.

[210] *Id.* at 37.

[211] *Id.* at 38.

[212] *Id.*

[213] *Id.* at 37-38.

[214] *Id.* at 45 (Brennan, J., dissenting).

[215] *Id.* at 46.

[216] *Id.* at 51 ("Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers to discover some detail of our personal lives.").

[217] *Id.* at 52.

[218] *Id.* at 41 (majority opionion).

One of the extraordinary aspects of the *Greenwood* decision was the Court's conclusion that Greenwood had exposed his garbage to public view,[222] and therefore could not object when the police also viewed it. The Court claimed that the police need not "avert their eyes from evidence of criminal activity that could have been observed by any member of the public,"[223] and rejected the argument that state law enhanced the Greenwoods' privacy expectations by making it illegal to go through their garbage.[224] Justice Brennan, dissenting, rejected the idea that the Greenwoods had subjected their garbage to public view noting that, until the police opened the bags, their contents were shielded from public view.[225]

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[219] *Id.* at 40.

[220] *Id.*

[221] *Id.* at 40-41 (quoting United States v. Reicherter, 647 F.2d 397, 399 (3d Cir. 1981)).

[222] *Id.* at 41.

[223] *Id.*

[224] *Id.* at 43-44.

> We have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs. We have emphasized instead that the Fourth Amendment analysis must turn on such factors as "our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion." We have already concluded that society as a whole possesses no such understanding with regard to garbage left for collection at the side of a public street. Respondent's argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission.

Id. (citing Oliver v. United States, 466 U.S. 170, 178 (1984)).

> The mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone.[226]

Indeed, the Greenwoods left their garbage at the curb because they were required to do so under local law.[227]

Inspecting the Interior of a Farm Barn. The Court also confronted a novel application of the REOP test in *United States v. Dunn*,[228] a case in which police entered private property to peer into a barn. The property in question involved 198 acres, was completely encircled by a perimeter fence, and had several interior fences, constructed mainly of posts and multiple strands of barbed wire.[229] The residence was situated one-half mile from a public road, and there was a fence around the residence as well as around a nearby small greenhouse.[230] Two barns were located approximately fifty yards from the house fence.[231] The front of the larger of the two barns was enclosed by a wooden fence and had an open overhang.[232] Locked, waist-high gates barred entry into the barn, and netting material stretched from the ceiling to the top of the wooden gates.[233] Despite the security, law enforcement officials made a warrantless entry onto the property and peered into the barns (after crossing a barbed wire fence, as well as a wooden fence that enclosed the front portion of the barn, and walking under the barn's overhang to the locked wooden gates) where they shined a flashlight through the netting on top of the gates and observed what they took to be a phenylacetone laboratory.[234] Based on their observations, police obtained a warrant to search the property, and the search turned up evidence used to convict defendants of manufacturing illegal drugs.[235]

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[225] *Id.* at 53-54 (Brennan, J., dissenting).

[226] *Id.* at 54 (emphasis in original).

[227] *Id.* at 54-55.

[228] 480 U.S. 294 (1987).

[229] *Id.* at 297.

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

Once again, the Court had the opportunity to adopt an expansive and protective definition of the REOP test, and there were ample grounds for finding a REOP. Justice Brennan, joined by Justice Marshall, made this point in his dissent. He argued that the barn was within the curtilage of Dunn's house[236] and argued that "[o]ur society is not so exclusively urban that it is unable to perceive or unwilling to preserve the expectation of farmers and ranchers that barns and their contents are protected from (literally) unwarranted government intrusion."[237] Indeed, he argued that a barn functions as an integral part of the buildings associated with a farm home,[238] and that this barn fits within the general definition of curtilage because it was closely connected to the farm residence.[239] Moreover, Dunn took "elaborate" precautions to protect his barn, including locking his driveway, fencing in the barn, and covering its open end with a locked gate and fishnetting,[240] and indeed, he did everything he could do to protect the property against outsiders short of posting a guard.[241]

In addition, Justice Brennan noted that the Court had traditionally protected business and commercial activities against unreasonable searches and seizures, and noted that a barn is part of a rancher's place of business.[242] As a result, he concluded that Dunn had established a REOP in his barn under the circumstances:

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[234] *Id.*

[235] *Id.*

[236] *Id.* at 309.

[237] *Id.* at 306.

[238] *Id.* at 307 (quoting Walker v. United States, 225 F.2d 447, 449 (5th Cir. 1955)).

[239] *Id.* at 310-11.

[240] *Id.* at 312.

[241] *Id.*

[242] *Id.* at 315.

> Looking into a building from a vantage point inaccessible to the public—here by climbing over the 'substantial' wooden fence enclosing the front of the barn to intrude on Dunn's farmyard—is an unacceptable invasion of a reasonable privacy interest. When, as here, the public is excluded from an area immediately surrounding or adjacent to a business structure, that area is not—contrary to the Court's position—part of the open fields.[243]

Once again, the Court disagreed, construing the REOP test more narrowly. Applying the "open fields" exception to the warrant requirement, the Court held that the barns were not part of the "curtilage" surrounding Dunn's house and were not connected to the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'"[244] The Court emphasized that the barn was sixty yards from the house itself and outside the fence surrounding the house, and therefore the officers had reason to believe that the barn was not being used for intimate activities. Although there were fences on the property, the Court concluded that "the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas."[245] The Court emphasized that the officers did not enter the barn, but rather simply viewed the interior of the barn from open fields, and concluded that the Fourth Amendment did not forbid this observation.[246]

Overnight Guests. One of the post-*Katz* decisions in which the Court adopted a more expansive view of the REOP test was the holding in *Minnesota v. Olson.*[247] In that case, the Court held that an overnight guest in a house has a sufficient expectation of privacy in the house to have standing to challenge a search of the house. As the Court noted: "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the every day expectations of privacy that we all share."[248] Overnight stays involve a "longstanding social custom that serves functions recognized as valuable by society," and the Court emphasized that people stay "in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend."[249] Indeed, an overnight guest seeks shelter in another person's home "precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside."[250] Further, people are most vulnerable when they are asleep; "when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend."[251]

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[243] *Id.* at 318.

[244] *Id.* at 300-01 (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)).

[245] *Id.* at 303.

[246] *Id.* at 304.

[247] 495 U.S. 91 (1990).

Olson was an important decision because it recognized that an overnight guest has a REOP in the house where he/she is staying. However, *Olson* did not suggest a major change in the Court's Fourth Amendment jurisprudence or an expansion of the Court's pre-*Katz* search precedent. Even under the Court's pre-*Katz* decisions, an overnight guest would have had standing to challenge a search of the place where he/she was staying.

Businesses (including Closely Regulated Businesses). Another area where the Court applied the REOP test a bit more expansively was in situations involving searches of businesses or commercial premises. The Court has held that an owner or operator of a business has a REOP in commercial premises,[252] including a right against administrative inspections,[253] but it has also held that the owner or operator of a business has a lesser expectation than an individual ordinarily has in a home.[254] Nevertheless, in *Marshall v. Barlow's, Inc.*,[255] the Court concluded that a factory owner had a REOP against governmental inspections pursuant to the Occupational Safety and Health Act.[256] The critical question was whether the inspector or governmental agent is in a place open to the public, or a more private area.[257] This point was illustrated in *Maryland v. Macon*,[258] in which the Court held that a retail business did not have an expectation of privacy regarding wares offered to the public,[259] or against a law enforcement official entering the public or retail portion of the business.[260]

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[248] *Id.* at 98.

[249] *Id.*

[250] *Id.*

[251] *Id.* at 98-99.

[252] *See* New York v. Burger, 482 U.S. 691, 699 (1987); Marshall v. Barlow's, Inc., 436 U.S. 307, 311-13 (1978) ("[I]t is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.").

When a "closely regulated" business is involved, the Court has held that there is no expectation of privacy.[261] The Court noted that: "Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise."[262] The Court has applied this closely-regulated-industries exception to various businesses, including liquor dealers,[263] pawnshop and firearms dealers,[264] coal mines,[265] and even automobile junkyards.[266] In some instances, the Court suggests that the owners of such businesses have a "reduced" expectation of privacy,[267] and therefore are subject to different and reduced Fourth Amendment requirements.[268]

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[253] *See Marshall*, 436 U.S. at 307, 311-31 ("The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment . . . .").

[254] *See Burger*, 482 U.S. at 691, 699.

[255] 436 U.S. 307, 311-13 (1978).

[256] *Id.*

[257] *Id.* at 315 ("What is observable by the public is observable, without a warrant, by the Government inspector as well.").

[258] 472 U.S. 463 (1985).

[259] *Id.* at 469 ("Here, respondent did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact business.").

[260] *Id.* ("The officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment.").

[261] New York v. Burger, 482 U.S. 691, 699-700 (1987).

[262] *Id.* at 700 (quoting *Marshall*, 436 U.S. at 313).

[263] *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

[264] *See* United States v. Biswell, 406 U.S. 311 (1972).

[265] *See* Donovan v. Dewey, 452 U.S. 594, 603-04 (1981).

[266] *See Burger*, 482 U.S. at 698.

Once again, in these administrative cases, the Court did not use the REOP standard to significantly expand the scope of Fourth Amendment rights. Prior to these decisions, the Court had decided some cases suggesting that administrative inspections were not subject to the Fourth Amendment,[269] and the Court did reverse those decisions in its holding in *Camara v. Municipal Court.*[270] However, in none of these cases did the Court use the REOP test to significantly expand Fourth Amendment rights, and in fact, *Camara* focused primarily on whether Fourth Amendment requirements could function effectively in the administrative inspection context rather than on the definition of a search.[271]

Employee Desks, File Cabinets and Workspaces. The Court has used the REOP test to provide protections involving searches of employee work spaces. Illustrative is the plurality opinion in *O'Connor v. Ortega.*[272] The question was whether Ortega, a physician and psychiatrist at a state hospital had a REOP in his office, desk and file cabinets at his place of work. Ortega, who had primary responsibility for training young physicians in psychiatric residency programs, was under investigation for alleged improprieties (sexual harassment and improper solicitation of donations from subordinates).[273] After he was placed on paid leave, and while investigating the charges against Ortega, several hospital personnel searched his office, including his desk and file cabinets, and seized several items.[274]

Applying the REOP test, the Court held that Ortega had a REOP in his office, including his desk and file cabinets.[275] The

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[267] *Id.* at 701.

[268] *Id.* at 702.

[269] *See, e.g.*, Frank v. Maryland, 359 U.S. 360 (1959).

[270] 387 U.S. 523 (1967).

[271] *Id.* at 530-31.

[272] 480 U.S. 709 (1987).

[273] *Id.* at 709, 712.

[274] *Id.* at 709, 712-13.

[275] *Id.* at 719.

Court noted that, as "with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the Amendment.'"[276] Ortega's REOP existed even though he was a public employee, and was using a public work space.[277] However, the Court noted that an employee's expectation of privacy in an office, desk or file cabinet depends on the circumstances, and may be limited by the circumstances that exist in the workplace, and that there may be no REOP in some situations.[278] The Court emphasized that Ortega had used the office for seventeen years, did not share it with anyone, and that he kept various items (including personal items) in the office, and there was no policy preventing him from having personal items in his office.[279]

While *O'Connor* is clearly one decision in which the Court construes the REOP concept more expansively, it is not clear that the case would have been decided any differently under the Court's pre-*Katz* jurisprudence, and therefore it is difficult to argue that *O'Connor* created a shift in the Court's Fourth Amendment jurisprudence, or provided much protection against the specter of advancing technology.

Inspecting Shipped Packages. In its post-*Katz* decision in *United States v. Jacobsen*,[280] the Court had a further opportunity to interpret the REOP test expansively, but declined to do so. Under the Court's pre-*Katz* jurisprudence, in particular its holdings in *Ex parte Jackson*[281] and *Silverthorne Lumber Co. v. United States*,[282] the Court had held that individuals had a protected privacy interest in books and papers. In *Jacobsen*, the Court created an exception to those holdings. In *Jacobsen*, employees of a private freight carrier found a white powdery substance on a damaged package, and immediately opened it pursuant to company policy related to damaged packages and insurance claims.[283] When they observed white powder inside the package, company employees called the police.[284] When the police arrived, the box was still wrapped in brown paper, but had a hole punched in its side and an open top.[285] The officer removed the plastic bags from the box, took a knife's blade's worth of each, and subjected the substance to a chemical analysis which revealed that it was cocaine.[286] Since the initial opening of the package was done by private officials, the Court concluded that it did not implicate Jacobsen's expectation of privacy,[287] or create a search,[288] and therefore the government was free to use the information,[289] and reopen and inspect the powder without committing a "search" within the meaning of the Fourth Amendment.[290] Once again, Justice Brennan, joined by Justice Marshall, dissented. He doubted that Jacobsen's privacy had disappeared because it was not clear that the contents of the package were "plainly visible" when the private carrier turned the package over to the police[291] because a sophisticated surveillance technique was employed.

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[276] *Id.* at 716 (quoting Oliver v. United States, 466 U.S. 170, 178 n.8 (1984)).

[277] *Id.*

[278] *Id.* at 717 (The Court stated that one's REOP in a workplace environment "may be reduced by virtue of actual office practices and procedures, or by legitimate regulation" and the Court noted that "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable.").

[279] *Id.* at 718-19.

[280] 466 U.S. 109 (1984).

[281] 96 U.S. 727 (1877).

[282] 251 U.S. 385 (1920).

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[283] *Jacobsen*, 466 U.S. at 111.

[284] *Id.*

[285] *Id.*

[286] *Id.* at 111-12.

[287] *Id.* at 119-20.

> Respondents could have no privacy interest in the contents of the package, since it remained unsealed and since the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents. The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment.

Id.

[288] *Id.* at 121.

[289] *Id.* at 115.

[290] *Id.* at 117-18.

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed.

Id. (quoting United States v. Miller, 425 U.S. 435, 443 (1976)).

> The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.

Drug Sniffing Dogs. The Court had yet another opportunity to apply the REOP test in a novel context when it decided whether police use of drug sniffing dogs to smell suitcases constituted a search. Not uncommmonly, these dogs are used at airports or immigration points to determine whether individuals are carrying drugs on their body or in their suitcases or other closed containers (e.g., purses). By using the dogs, the police do not have to open the suitcase to determine whether the suitcase contains drugs. Instead, the dog simply sniffs the outside of the suitcase and alerts if drugs are present within. The question is whether the use of such dogs violates an individual's REOP and therefore constitutes a search within the meaning of the Fourth Amendment.

The Court restrictively applied the REOP test in *United States v. Place*,[292] and concluded that a dog sniff of luggage did not constitute a search within the meaning of the Fourth Amendment.[293] Although the Court recognized that an individual has a privacy interest in the contents of luggage,[294] the Court found no search because the dog sniff did not involve opening the luggage, did not "expose noncontraband items that otherwise would remain hidden from public view," and was "less intrusive than a typical search."[295] Moreover, although the sniff provided the police with information about the contents of luggage, "the information obtained is limited" and does not involve "the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."[296] The

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Id.

[291] *Id.* at 133-43 (Brennan, J., dissenting).

[292] 462 U.S. 696 (1983).

[293] *Id.* at 707.

[294] *Id.* ("We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment.").

[295] *Id.*

[296] *Id.*

Court concluded that canine sniffs are sui generis in the sense that the Court was "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[297] As a result, the Court held that a canine sniff of luggage does not involve a search within the meaning of the Fourth Amendment.[298]

Justice Brennan, joined by Justice Marshall, concurred, but expressed reservations about the Court's conclusions because of the "especially sensitive concerns" raised by the case.[299] He noted that a dog "adds a new and previously unobtainable dimension to human perception," and (in his view) "represents a greater intrusion into an individual's privacy."[300] In his view, such "use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic detection devices."[301]

Peering into Automobiles. Can police officers peer into the interior of automobiles without creating a search under the REOP test? This issue arose in *Texas v. Brown*,[302] a case in which a police officer viewed vials of illegal drugs during a traffic stop.[303] Noting that the general public could have peered into Brown's vehicle (for example, had it been parked on a public street), the Court concluded that a police officer should be allowed to do so as well.[304] Citing *Katz*, the Court noted that there is "no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers."[305] As a result, the Court concluded that the officer did not "search" the vehicle within the meaning of the Fourth Amendment.[306]

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[297] *Id.*

[298] *Id.*

[299] *Id.* at 719.

[300] *Id.* at 719-20.

[301] *Id.*

[302] 460 U.S. 730 (1983).

[303] *Id.* at 734.

[304] *Id.* at 740.

[305] *Id.*

Brown is not a terribly surprising decision because it is consistent with the Court's general holding that, while individuals have an expectation of privacy in their automobiles,[307] this expectation is considered to be limited or "diminished."[308] Moreover, it is doubtful that *Brown* would have been decided any differently under the Court's pre-*Katz* jurisprudence. Since the officer did not enter the vehicle, and therefore did not enter a constitutionally protected area, there would have been no search under decisions like *Olmstead* and *Goldman*. As a result, under the Court's pre-*Katz* jurisprudence, as well as under *Katz's* REOP test, there was no search within the meaning of the Fourth Amendment. The bottom line is that *Brown* was not a "game changer" in terms of the Court's Fourth Amendment analysis.

In the final analysis, few of the Court's non-technology post-*Katz* decisions suggested that the Court has construed the REOP test expansively, and those decisions did not lay much of a groundwork for dealing with the problems of advancing technology. In the few instances when the Court had the opportunity to apply the REOP in novel contexts, the Court usually found that the individual had no REOP in that particular situation. Thus, the Court held that the police could search through an individual's garbage (*Greenwood*),[309] that the police could use a canine sniff to ascertain the contents of luggage

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[306] *Id.*

[307] *See* New York v. Class, 475 U.S. 106, 114-15 (1986) ("While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police.").

[308] *See id.* at 112-13; South Dakota v. Opperman, 428 U.S. 364, 367 (1976) ("Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.").

[309] California v. Greenwood, 486 U.S. 35 (1988).

(*Place*),[310] and that the police could enter property to peer into a barn (*Dunn*).[311] In addition, the Court used the REOP test to deny standing to a passenger in an automobile (*Rakas*),[312] someone who was visiting an apartment (*Carter*),[313] and someone who placed property in another person's purse (*Rawlings*).[314] Although the Court found a REOP in some post-*Katz* decisions, it was not clear that these cases were significant in the sense that the cases would have been decided differently under the Court's pre-*Katz* jurisprudence.

Some of the Court's post-*Katz* decisions had potentially troubling implications for the individual interest in privacy. For example, the *Place* decision had enormous implications for the use of dogs in other contexts, and raised questions regarding whether the police could take a drug sniffing dog into apartments and condominium buildings and have them sniff at the front doors of apartments or condos. One might argue that the *Place* analysis suggests that the use of drug sniffing dogs is permissible in this context. After all, canine sniffs are sui generis, are limited in manner, and arguably do not involve "the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods."[315] However, it is not clear that the *Place* analysis would apply if a canine sniff is used at an apartment building or condominium. The holding in *Kyllo*, discussed in the following section, suggests why.[316] However, *Place* also raised questions about whether non-canine technological devices could be used by police or government if they did nothing more than pick up sounds emanating from a house, apartment, car or business.

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[310] United States v. Place, 462 U.S. 696 (1983).

[311] United States v. Dunn, 480 U.S. 294 (1987).

[312] Rakas v. Illinois, 439 U.S. 128 (1978).

[313] Minnesota v. Carter, 525 U.S. 83 (1998).

[314] Rawlings v. Kentucky, 448 U.S. 98 (1980).

[315] New York v. Class, 475 U.S. 106, 107 (1986).

[316] *See infra* pp. 61, 72-76.

IV. *KATZ* AS APPLIED TO ADVANCING TECHNOLOGIES

Although the REOP test was crafted to deal with the problem of advancing technology, the Court has generally not chosen to apply *Katz* expansively when it has been confronted by new forms of technology either.[317] Indeed, the test seems somewhat ill-suited to deal with the problems of technology. The Court's initial focus under the REOP test was on whether an individual held an "expectation of privacy" against a particular police practice, a test that was later modified to focus on whether there was a REOP against such practices. The difficulty is that, as technology gets better, individual expectations of privacy may become less and less reasonable. Indeed, today, relatively sophisticated listening devices are available that allow the police and neighbors to snoop on others. Moreover, as technology becomes increasingly more sophisticated, and often increasingly cheaper to purchase, does the "reasonableness" of an individual's expectations of privacy gradually disappear? In other words, has the *Katz* test created an inevitable collision between privacy expectations and technology?

The other problem, and one that the Court has not addressed, is whether government may manipulate the citizenry's REOP. Suppose that the government acquires sophisticated listening devices—devices that are not readily available to the ordinary citizen—and the government announces that it will place such monitoring devices on public property outside of every home in order to monitor all conversations that take place in those houses twenty-four hours a day.[318] Is it possible for citizens to have a "reasonable expectation of privacy" in their conversations? Would it be permissible to take the less intrusive step of monitoring all public streets with video surveillance cameras? Of course, this general idea (originally conceived (albeit slightly differently) by Professor Anthony Amsterdam[319]) raises the broader question of how courts determine whether an expectation of privacy exists. Even though technology is available, and ordinary people have access to it, the Court could hold that it is unacceptable in a free society for government to use that technology to spy on people. If so, then the Court would be reaffirming the expectations of people, and their sense of what constitutes a "search" within the meaning of the Fourth Amendment.

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[317] In a break from decisions like *Olmstead* and *Goldman*, the *Katz* Court purported to shift the focus of Fourth Amendment protections from "places" to persons, in the sense that there had to be an intrusion into a "constitutionally protected area". Katz v. United States, 389 U.S. 347, 350-51 (1967). Indeed, the Court stated emphatically that "the Fourth Amendment protects people, not places." *Id.* at 351. The difficulty is that the Court's conclusions simply could not be squared with the literal language of the Fourth Amendment which specifically refers to the protection, not only of people, but also to places (e.g., houses) and, indeed, things (papers and effects). U.S. CONST. amend. IV. As Justice Black noted in his dissent: "The first clause protects 'persons, houses, papers, and effects, against unreasonable searches and seizures . . . .' These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both." *Id.* at 518-19 (Black, J., dissenting). He went on to note that the "second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those 'particularly describing the place to be searched, and the persons or things to be seized.'" *Id.* at 519. Of course, to the extent that the Fourth Amendment protects houses, papers and effects, it does so because those things are owned by people who have ownership or possessory interests in those things. Nevertheless, there is explicit protection for places such as homes.

These unanswered questions left open a number of fundamental questions and issues in the succeeding years and cases, and there was doubt about how the *Katz* test would be applied. For example, is there a violation of a REOP if the police place cameras in public places to monitor what happens there? What if the police attach GPS devices to cars (with or without the owner's knowledge and consent)? More to the point, what would happen if the police used sophisticated listening devices or x-ray machines to pick up conversations or activities occurring inside a house? *Katz* seemed to suggest (by analogy to the facts in *Katz*) that use of the sophisticated listening devices of x-ray machines to ascertain conversations or activities inside a house would constitute a search within the meaning of the Fourth Amendment, but would the Court construe the REOP test in that way? In addition, what would happen as technology becomes steadily more advanced, and (as often happens) cheaper and cheaper, and readily available to everyone? For example, suppose that Radio Shack sells inexpensive listening devices that allow individuals to overhear the conversations in their neighbors' yards? Or, even worse, suppose that it sells devices that allow an individual to sit in his own home, but overhear conversations occurring (at normal tones) in neighbors' homes? Will the cheapness and ready availability of this technology undercut the neighbors' expectations of privacy in conversations that take place in their homes and yards? As a result, if the police use such technology from the street to overhear what is being said inside a house or in a backyard, is there no longer a REOP in the house or the backyard? Alternatively, will the Court hold that the use of such technology—by either the neighbors or the police—offends fundamental notions of decency, or at least violates a REOP? After all, the Court has shown a greater tendency to be protective of the home (if not the backyard),[320] and might be protective of the home as it was in *Kyllo* (discussed below).[321] However, even *Kyllo* suggested that technology might not be proscribed to the police if it were cheap and readily available to everyone else.

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[318] *See* Amsterdam, *supra* note 20, at 349.

[319] *Id.* Amsterdam suggests that an:

> actual subjective expectation of privacy obviously has no place in a statement of what Katz held or in a theory of what the Fourth Amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to Fourth Amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.

Id. at 404.

In the Court's post-*Katz* decisions, the Court has not provided individuals with much protection against the onslaught of advancing technology. However, there are a few encouraging decisions, and some encouraging statements from the Court. On balance, however, the Court's post-*Katz* technology decisions reveal many of the problems and difficulties that existed with the Court's pre-*Katz* precedent, and the Court's post-*Katz* non-technology decisions continue to struggle with many of the issues debated by the Court in *Olmstead*, *Goldman* and *Silverman*.

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[320] *See* Kyllo v. United States, 533 U.S. 27 (2001).

[321] *See infra* pp. 61, 72-76.

Flashlights. As a general rule, the Court has been reluctant (with some exceptions) to hold that police use of technology constitutes a search when the police do not intrude into a constitutionally protected area. Indeed, if the police use technology merely as a form of sense enhancement, the use of that technology has generally been upheld. For example, in the plurality decision in *Texas v. Brown*,[322] a police officer shined a flashlight into a car during an ordinary traffic stop in order to better see vials of illegal drugs.[323] Although the case focused primarily on application of the plain view doctrine, and the issue of whether the officers could seize the drugs, the search issue arose because the officer used the flashlight to help him see inside the car (which he did not enter). The Court concluded that there was no search within the meaning of the Fourth Amendment.[324] The Court regarded the officer's use of the flashlight as no different than the use of ordinary field binoculars, and concluded that "the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection."[325] There were no dissents on this issue.

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[322] 460 U.S. 730 (1983).

[323] *Id.* at 733-34. The Court described the facts as follows:

> On a summer evening in June, 1979, Tom Maples, an officer of the Fort Worth police force, assisted in setting up a routine driver's license checkpoint on East Allen Street in that city. Shortly before midnight Maples stopped an automobile driven by respondent Brown, who was alone. Standing alongside the driver's window of Brown's car, Maples asked him for his driver's license. At roughly the same time, Maples shined his flashlight into the car and saw Brown withdraw his right hand from his right pants pocket. Caught between the two middle fingers of the hand was an opaque, green party balloon, knotted about one half inch from the tip. Brown let the balloon fall to the seat beside his leg, and then reached across the passenger seat and opened the glove compartment.
>
> Because of his previous experience in arrests for drug offenses, Maples testified that he was aware that narcotics frequently were packaged in balloons like the one in Brown's hand. When he saw the balloon, Maples shifted his position in order to obtain a better view of the interior of the glove compartment. He noticed that it contained several small plastic vials, quantities of loose white powder, and an open bag of party balloons. After rummaging briefly through the glove compartment, Brown told Maples that he had no driver's license in his possession. Maples then instructed him to get out of the car and stand at its rear. Brown complied, and, before following him to the rear of the car, Maples reached into the car and picked up the green balloon; there seemed to be a sort of powdery substance within the tied-off portion of the balloon.

Id.

[324] *Id.* at 740 (in particular, the Court stated that the officer's actions "trenched upon no right secured to the latter by the Fourth Amendment.").

While the *Brown* decision does not reflect an expansive view of the REOP test, it is not terribly illuminating either. Under the Court's pre-*Katz* precedent, the Court would have been disinclined to find a search on such facts anyway. Although Brown reaches the same result, it offers the not terribly surprising conclusion that the use of flashlight technology does not impose any special burden on a suspect's REOP, and therefore is permissible. Although the Court could have established limits on the use of technology in *Brown*, its decision not to do so is understandable.

Information Voluntarily Conveyed to a Third Party. A more troubling decision is the holding in *Smith v. Maryland*,[326] in which the police used a pen register to record the numbers dialed from Smith's home phone.[327] The pen register is a device, in this case installed by the phone company at its central offices, that can record the phone numbers dialed from a phone,[328] but which does not record the contents of the telephone conversations themselves.[329] Smith argued that he had a REOP in the

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[325] *Id.*

[326] 442 U.S. 735 (1979).

[327] *Id.* at 737. Smith was suspected of having committed a robbery, and the police had traced his license plate number to him. The pen register was installed in an effort to obtain additional information. *Id.*

[328] *Id.* The Court described a pen register as follows: "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." *Id.* at 736 n.1 (quoting United States v. N.Y. Tel. Co., 434 U.S. 159, 161 n.1 (1977)). The device is installed at a central location at the phone company, and generates a written record of all phone numbers called from the phone being surveilled. *Id.*

[329] *Id.* at 741.

> [A] law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed—a means of establishing communication. Neither the purport of any communication be-

phone numbers because he dialed them from the privacy of his home, and he contended that a reasonable person would expect privacy in the contents of the numbers dialed. Applying the *Katz* test,[330] the Court disagreed, emphasizing that people realize that the phone company has the capacity to record the numbers they call,[331] that it exercises that capability when it records the numbers called for long distance billing purposes,[332] and that the phone company also uses its call records to help protect customers against unwelcome or harassing phone calls.[333] As a result, the Court concluded that telephone users do not have a REOP in the telephone numbers that they dial.[334] The troubling aspect of the decision was that the Court went on

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> tween the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers.

Id.

[330] *Id.*

> Petitioner's claim, rather, is that, notwithstanding the absence of a trespass, the State, as did the Government in *Katz*, infringed a "legitimate expectation of privacy" that petitioner held. Yet a pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the contents of communications.

Id.

[331] *Id.* at 742.

[332] *Id.*

> [We] doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud and preventing violations of law." Electronic equipment is used not only to keep billing records of toll calls, but also "to keep a record of all calls dialed from a telephone which is subject to a special rate structure."

Id. (citations omitted).

[333] *Id.* at 742-43 ("Most phone books tell subscribers, on a page entitled 'Consumer Information,' that the company 'can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls.'") (internal citation omitted).

[334] *Id.* at 743 ("Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.").

to voice the sweeping generalization that an individual has "no legitimate expectation of privacy" that he "voluntarily turns over to third parties,"[335] including information turned over to the company's mechanical equipment.[336]

Smith sparked considerable debate between the Justices regarding the meaning of the REOP concept, and the debate was similar to the debates that occurred in the Court's pre-*Katz* jurisprudence. For example, Justice Stewart, dissenting, found it difficult to reconcile the decision with the holding in *Katz* (that a conversation was protected even though it went through the same third party, the phone company), and he argued that Smith was in a comparable position to Katz (if not in a position even more deserving of protection) because he made his calls from a phone in his own home.[337] Smith had no choice but to convey the phone numbers to the phone company,[338] if he wanted to use his phone, and Justice Stewart speculated that not many people would be happy to know that the numbers they dial (and thereby send to the phone company) have no constitutional protection against searches and seizures, especially given that such calls might reveal the intimate details of the individual's life.[339]

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[335] *Id.* at 744.

> When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy.

Id.

[336] *Id.* at 745.

> Petitioner argues, however, that automatic switching equipment differs from a live operator in one pertinent respect. An operator, in theory at least, is capable of remembering every number that is conveyed to him by callers. Electronic equipment, by contrast can "remember" only those numbers it is programmed to record, and telephone companies, in view of their present billing practices, usually do not record local calls. Since petitioner, in calling McDonough, was making a local call, his expectation of privacy as to her number, on this theory, would be "legitimate." This argument does not withstand scrutiny. The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not in our view, make any constitutional difference. Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police. Under petitioner's theory, Fourth Amendment protection would exist, or not, depending on how the telephone company chose to define local-dialing zones, and depending on how it chose to bill its customers for local calls. Calls placed across town, or dialed directly, would be protected; calls placed across the river, or dialed with operator assistance, might not be. We are not inclined to make a crazy quilt of the Fourth Amendment, especially in circumstances where (as here) the pattern of protection would be dictated by billing practices of a private corporation.

Id.

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[337] *Id.* at 746 (Stewart, J., dissenting).

> In *Katz v. United States*, the Court acknowledged the "vital role that the public telephone has come to play in private communication[s]." The role played by a private telephone is even more vital, and since *Katz* it has been abundantly clear that telephone conversations carried on by people in their homes or offices are fully protected by the Fourth and Fourteenth Amendments.

Id. (Stewart, J., dissenting) (citations omitted).

[338] *Id.* at 746-47.

> A telephone call simply cannot be made without the use of telephone company property and without payment to the company for the service. The telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment. Yet we have squarely held that the user of even a public telephone is entitled "to assume that the words he utters into the mouthpiece will not be broadcast to the world."

Id. (quoting Katz v. United States, 389 U.S. 347, 352 (1967)).

[339] *Id.* at 748.

> I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

Id. (Stewart, J., dissenting); *see also* Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1314 (1981).

> Indeed, it would seem that the only sensible conclusion to be drawn in these cases is that a bank customer should enjoy a reasonable expectation of privacy in the confidential financial information that he discloses to his bank. Thus, the Court's holding in *Miller* can only be indicative of an attempt to emasculate the *Katz* privacy formula in the interest of lessening judicial supervision over law enforcement activities.

Id.

Justice Marshall also dissented, arguing that people expect privacy, not only in the contents of their telephone conversations, but also regarding the phone numbers that they dial.[340] Even if individuals disclose those numbers to the phone company for a limited purpose (e.g., to make phone calls), people do not expect that this information will be released to other persons for other reasons, and they certainly do not contemplate that they are releasing the information for general distribution to the public.[341] Moreover, when people make phone communications, they had little choice (at that time anyway) but to use that mode of communication, and therefore he argued that they did not assume the risk that the information will be made public.[342]

The interesting thing about the Marshall dissent is that he urged the Court to consider a redefinition of the *Katz* test. In his view, the test should focus "not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society."[343] He argued that citizens should not be required to assume the risk that the numbers they dial will be turned over to authorities considering the "intrinsic character" of the investigative practice, the "basic values underlying the

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[340] *Smith*, 442 U.S. at 748-49 (Marshall, J., dissenting) ("[E]ven assuming, as I do not, that individuals 'typically know' that a phone company monitors calls for internal reasons [ ] it does not follow that they expect this information to be made available to the public in general or the government in particular.").

[341] *Id.* at 749-50.

> Implicit in the concept of assumption of risk is some notion of choice. At least in the third-party consensual surveillance cases, which first incorporated risk analysis into Fourth Amendment doctrine, the defendant presumably had exercised some discretion in deciding who should enjoy his confidential communications.

Id.

[342] *Id.* at 750.

> By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance . . . . It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative.

Id.

[343] *Id.*

Fourth Amendment," and the fact that such intrusions "significantly jeopardize [an individual's] sense of security."[344] He emphasized that telephonic communications play a vital role in life,[345] and he argued that the prospect of government monitoring of conversations may be disturbing to "members of unpopular political organizations or journalists with confidential sources" who "may legitimately wish to avoid disclosure of their personal contacts,"[346] and, therefore, that the decision may have a negative effect on certain forms of political association.[347] In addition, he saw no difference between the facts in *Smith* and the facts in *Katz*.[348]

Smith is hardly the only decision in which the Court has held that an individual does not hold an expectation of privacy in information turned over to a third party. For example, in *United States v. Miller*,[349] the Court held that copies of checks and other bank records turned over to a bank were not accompanied by a REOP, especially since a federal law (Bank Secrecy Act of 1970) required that the records be kept.[350] *Miller* provided a clear opportunity for the Court to show that *Katz* had altered the Court's Fourth Amendment jurisprudence. Nevertheless, *Miller* rejected the Fourth Amendment claim noting "that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest,"[351] and holding that Miller could not assert either ownership or possession over the papers because the bank kept those records pursuant to its statutory obligations.[352] Moreover, the Court concluded that, because of the Act, the "depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."[353] Justice Brennan dissented arguing that Miller had a legitimate expectation of privacy in the copies of his checks and other records held by his bank.[354]

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[344] *Id.* at 751.

[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] *Id.* at 752 (quoting Katz v. United States, 389 U.S. 347, 352 (1967) ("Just as one who enters a public telephone booth is 'entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world,' . . . so too, he should be entitled to assume that the numbers he dials in the privacy of his home will be recorded, if at all, solely for the phone company's business purposes.").

[349] 425 U.S. 435 (1976).

[350] *Id.* at 442-43.

[351] *Id.* at 440.

[352] *Id.* at 442.

Miller was followed by the holding in *Couch v. United States*,[355] a case that involved a summons issued to Couch's accountant for the production of documents, including "books, records, bank statements, cancelled checks, deposit ticket copies, workpapers and all other pertinent documents pertaining to the tax liability of the above taxpayer."[356] Although the case focused primarily on whether Couch could assert her Fifth Amendment privilege against self-incrimination, the case also involved Fourth Amendment claims. In particular, Couch attempted to rely on an alleged "accountant-client relationship" to establish a REOP in documents held by the accountant on her behalf.[357] The Court rejected the idea of a confidential accountant-client privilege, and held that "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return."[358] Like *Miller*, *Couch* provided the Court with an opportunity to clearly establish that its Fourth Amendment jurisprudence had changed. As with bank records, when one turns records over to an accountant, one assumes that they will be used for a limited purpose, and not disclosed generally to the public, and therefore arguably maintains an expectation of privacy in the records. The Court did not adopt that approach.

Pushed to their logical extremes, decisions like *Smith*, *Miller* and *Couch* raise troubling questions regarding the meaning of the REOP test. In a modern society, many items of personal information are voluntarily conveyed to third parties. In addition to phone calls, most people send e-mails through Internet service providers (ISPs), and some even maintain their computer data on sites maintained by others (so-called "cloud computing").[359] The advantage of cloud computing is that users are not tied to their computers (whether at business or at home), and therefore can access their data anywhere in the world. Most commentators would be inclined to think that there is a REOP in e-mail stored on ISPs and data stored on clouds.[360] The difficulty is that, since the information stored on the cloud is conveyed to a third party (the owner of the cloud) for storage, *Smith*, *Miller* and *Couch* might suggest that the information is not protected against governmental prying. Indeed, if strictly applied, *Smith* may suggest that even the *Katz* decision is no longer good law. As more than one of the dissenting *Smith* Justices noted, Katz used the same third party to convey his information as Smith had used. As a result, if one really cannot claim a REOP for information voluntarily conveyed to a third party, then the conversation might not have a REOP either unless one distinguishes the two situations (as will be discussed more fully below).

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[353] *Id.*

[354] *Id.* at 448.

[355] 409 U.S. 322 (1973).

[356] *Id.* at 323.

[357] *Id.* at 335.

[358] *Id.*

Is it possible that such actions (phone calls, e-mails and cloud computing) are not protected by a REOP? One would guess not. The Court might distinguish e-mails and cloud computing from the scenarios involved in cases like *Smith*, *Miller* and *Couch* on the basis that the nature of the information conveyed by e-mails and cloud computing is fundamentally different. Even if someone expects the phone company to maintain records of the phone numbers dialed by a customer, for long distance purposes or to prevent harassment, one ordinarily does not expect the phone company to monitor the contents of conversations. Like a letter that one sends through the mail, while it may be possible to determine to whom the letter was addressed, one would think that the contents of the letter are accompanied by an expectation of privacy. Similarly, when one sends e-mails through an ISP, or maintains data on a "cloud," one does not expect the ISP or the company that maintains the cloud to monitor the content of the e-mails or the data stored on the cloud. After all, e-mails and clouds are protected by passwords and other security devices that allow only the customer to access the information and prevent the owner of the hardware from accessing it. As a result, one can argue that the content of the information has not been revealed to the third party. However, this only a supposition. The Court's precedents in *Smith*, *Miller* and *Couch* have never been overruled, and their meaning has not been further defined.

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[359] *See* David A. Couillard, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 MINN. L. REV. 2205 (2009).

[360] *See* Patricia L. Bellia & Susan Freiwald, *Fourth Amendment Protections for Stored E-Mail*, 2008 U. CHI. LEGAL F. 121.

In the final analysis, the *Smith* decision is like many of the Court's non-technology decisions applying the REOP test (in particular, *Oliver*, *Greenwood* and *Place*). As with those other decisions, the Court does not construe and apply the concept of a REOP expansively, and does not lay the groundwork for dealing with other more advanced forms of technology that may be developed.

Low-Flying Helicopters (and other sophisticated surveillance devices). In several cases, the Court has been asked to resolve the question of whether the police may use yet another form of technology, in particular low-flying helicopters, to spy on properties. This issue is of particular importance to Fourth Amendment jurisprudence because police can combine the helicopter (itself an expensive piece of machinery) with other more sophisticated pieces of electronic equipment such as highly sophisticated binoculars and cameras that allow the user to pick up small details about a distant place. For example, may the police fly a helicopter over a house and use high-tech binoculars to peer down through the skylight of a house or through the windows of the house? Likewise, highly sophisticated satellites have been developed that allow a camera, positioned in outer space, to pick up detail regarding a place on earth. May the police use these various types of technologies to allow them to peer down into houses?

The Court's rulings regarding the use of helicopters were not reassuring in terms of the meaning and application of the

REOP test and its application to new forms of technology. Illustrative is the holding in *California v. Ciraolo*,[361] in which police suspected that Ciraolo was growing marijuana in his fenced backyard, but found it difficult to view the property from the ground because it was surrounded by a ten-foot fence.[362] Police, therefore, decided to fly a plane about one-thousand feet above the property (which was regarded as "navigable airspace") in order to confirm their suspicions.[363] From that height, the officers could readily identify marijuana plants eight-to-ten-feet high growing in a fifteen-by-twenty-foot plot in respondent's yard, took photographs with a standard 35mm camera, and were able to obtain a search warrant, which led to the seizure of seventy-three marijuana plants.[364] The Court held that police use of the plane did not constitute a "search" within the meaning of the Fourth Amendment.[365] While recognizing that the courts have historically accorded greater protection to the curtilage surrounding a home, and noting that Ciraolo had gone to great lengths to preserve the privacy of his curtilage, thereby manifesting his subjective expectation of privacy,[366] the Court held that Ciraolo did not have a REOP because the plane was in navigable airspace, and the marijuana plants could be viewed with the naked eye from that position.[367] As a result, Ciraolo's expectation of privacy was less than that of Katz who placed a call from a phone booth.[368]

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[361] 476 U.S. 207 (1986).

[362] *Id.* at 209.

[363] *Id.*

[364] *Id.* at 209-10.

[365] *Id.* at 215.

[366] *Id.* at 212-13.

> At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life." The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened. The claimed area here was immediately adjacent to a suburban home, surrounded by high double fences.

Id. (citations omitted).

[367] *Id.* at 213-14.

Once again, there was a division within the Court, and disagreement about how the Court should apply the REOP test to technology. Justice Blackmun, dissenting, vigorously disputed the Court's conclusions, arguing that Ciraolo (like anyone else) had a REOP in the curtilage of his home.[369] Although it was theoretically possible for planes to fly at such low altitudes over a house, the chances of that happening were (in his opinion) "virtually nonexistent."[370] Although commercial flights (or other planes) might have flown over Ciraolo's property, the reality is that passengers in those planes would have "at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass," and the "risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against."[371] As a result, Justice Blackman argued that, while many people build fences around

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> The observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed. On this record, we readily conclude that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.

Id. (internal citation omitted).

[368] *Id.* at 214-15.

> But Justice Harlan's observations about future electronic developments and the potential for electronic interference with private communications were plainly not aimed at simple visual observations from a public place . . . . Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard.

Id. (internal citation omitted).

[369] *Id.* at 219 (Powell, J., dissenting).

[370] *Id.* at 223.

[371] *Id.* at 223-24.

their property, few feel the need to "build roofs over their backyards" because people do not intend to expose their backyards to aerial surveillance.[372] He also expressed concern about the fact that advancing technology might eventually allow police to peer inside of homes, thereby creating an inevitable loss of privacy.[373]

The Court rendered a similar decision in *Florida v. Riley*,[374] a case in which police flew at an even lower level (four-hundred feet) in order to determine whether a property owner was growing marijuana inside a greenhouse located in a rural area about ten-to-twenty feet from Riley's mobile home.[375] A clear view of the house was obscured from ground level because of the surrounding trees and shrubs, as well as because the greenhouse was covered by corrugated roofing panels, some translucent and some opaque.[376] However, "two of the panels on the greenhouse, amounting to approximately ten-percent of the roof area, were missing."[377] "A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a 'DO NOT ENTER' sign."[378] By using the helicopter, a police officer was able to observe (with his naked eye) the fact that Riley was growing marijuana in the greenhouse, and then to obtain a search warrant that revealed the presence of marijuana.[379]

Once again, the Court's approach to the REOP test did not reflect an expanded view of privacy. Although the Court concluded that Riley had a subjective expectation of privacy in the greenhouse, the Court relied on *Ciraolo* in holding that the expectation was not objectively reasonable since the roof was open and the interior of the greenhouse could be viewed from the air.[380] The Court rejected the argument that a flight at 400 feet was more objectionable than a flight at 1,000 feet (as had occurred in *Ciraolo*).[381]

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[372] California v. Ciraolo, 476 U.S. 207, 223-24 (1986) (Blackmun J., dissenting).

[373] *Id.* at 226.

[374] 488 U.S. 445 (1989).

[375] *Id.* at 448.

[376] *Id.*

[377] *Id.*

[378] *Id.*

[379] *Id.* at 448-49.

[380] *Id.* at 450-51.

In *Riley*, Justice Brennan, joined by Justices Marshall and Stevens, dissented.[382] Brennan would have altered the Court's approach to determining whether a REOP existed, and he would have applied a quite different test in determining whether the Fourth Amendment applied. In particular, he would have asked "whether, if the particular form of surveil-

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> Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation. Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air. Under the holding in *Ciraolo*, Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet or, as the Florida Supreme Court seemed to recognize, at an altitude of 500 feet, the lower limit of the navigable airspace for such an aircraft. Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, "private and commercial flight [by helicopter] in the public airways is routine" in this country . . . and there is no indication that such flights are unheard of in Pasco County, Florida. Riley could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft.

Id. (quoting California v. Ciraolo, 476 U.S. 207, 215 (1986)).

[381] *Id.* at 451-52.

> But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft. Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more. This is not to say that an inspection of the curtilage of a house from an aircraft will always pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law. But it is of obvious importance that the helicopter in this case was *not* violating the law, and there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude. Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment.

Id. (emphasis in original).

[382] *Id.* at 456 (Brennan, J., dissenting).

lance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."[383] As with the *Ciraolo* dissent, he doubted the Court's assumption that people routinely fly helicopters at such low heights over houses (or greenhouses) in order to peer into them,[384] and he questioned whether Riley's REOP should have turned on administrative regulations specifying what constitutes navigable air space.[385] He emphasized that the police were using a "very expensive and sophisticated piece of machinery" which allowed them to view Riley's property from a vantage point "to which few ordinary citizens have access,"[386] and he expressed concern about "how tightly the Fourth Amendment permits people to be driven back into the recesses of their lives by the risk of surveillance."[387]

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[383] *Id.* (quoting Amsterdam, *supra* note 20, at 403).

[384] *Id.* at 457-58.

> Notwithstanding the plurality's statistics about the number of helicopters registered in this country, can it seriously be questioned that Riley enjoyed virtually complete privacy in his backyard greenhouse, and that that privacy was invaded solely by police helicopter surveillance? Is the theoretical possibility that any member of the public (with sufficient means) could also have hired a helicopter and looked over Riley's fence of any relevance at all in determining whether Riley suffered a serious loss of privacy and personal security through the police action?

Id.

[385] *Id.* at 458-59.

> It is a curious notion that the reach of the Fourth Amendment can be so largely defined by administrative regulations issued for purposes of flight safety. It is more curious still that the plurality relies to such an extent on the legality of the officer's act, when we have consistently refused to equate police violation of the law with infringement of the Fourth Amendment.

Id.

[386] *Id.* at 460 ("To say that an invasion of Riley's privacy from the skies was not impossible is most emphatically not the same as saying that his expectation of privacy within his enclosed curtilage was not 'one that society is prepared to recognize as reasonable.'").

[387] *Id.* at 466 (quoting Amsterdam, *supra* note 20, at 402). He went on to note that:

> The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. I hope it will be a matter of concern to my colleagues that

At this point, it is not clear how far the *Ciraolo* and *Riley* decisions will extend. Since both cases involved the curtilage of a residence, and in only one of the cases (*Riley*) did the police peer into a building, it is not clear whether the Court would allow police to use a helicopter to spy on the interior of a home. However, the language of both opinions was not reassuring on this point. Suppose, to recite an example used earlier, the police use a helicopter to fly low over a house (the 400 feet that was at issue in *Riley*), and they attempt to peer down through skylights or other open windows into a home. Would the Court find that the police had committed a "search" within the meaning of the Fourth Amendment? After all, as in *Ciraolo* and *Riley*, the police would be in navigable air space and would be observing what anyone could see who chose to fly there. As a result, under the logic of *Ciraolo* and *Riley*, it would be difficult to conclude that there was a search within the meaning of the Fourth Amendment. Nevertheless, under the logic of the Court's subsequent decision in *Kyllo v. United States*,[388] in which the Court was extremely protective regarding police attempts to pry into the privacy of a home, the Court might be inclined to find a search. The Court might be particularly inclined to find a search if the police chose to supplement the helicopter by using very powerful and sophisticated cameras or binoculars that enhanced their ability to see into the house. However, the precise outcome of such a case is far from clear.

In the final analysis, as with other post-*Katz* precedent, it is not clear that decisions like *Ciraolo* and *Riley* have interpreted the Fourth Amendment any more broadly than the Court's other post-*Katz* precedent, or that they establish a

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the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's:

> "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said. . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows." Nineteen Eighty-Four 4 (1949).

Id.

[388] 533 U.S. 27 (2001).

sound framework for addressing issues that arise related to advancing technology. As with flashlights and pen registers, the Court expressed no concerns about the use of helicopters and planes.

Aerial Photography of Industrial Facilities. In another case, *Dow Chemical Company v. United States*,[389] the government did in fact supplement a fly-over with photographic equipment. That case involved aerial photography of Dow Chemical's 2,000-acre area chemical manufacturing facility.[390] Although the complex could be viewed from the air, Dow had taken elaborate security measures around the perimeter of the complex that barred ground-level public views of the complex, and it took security measures against low-flying aircraft.[391] However, because the complex was so large, Dow was not able to conceal all exterior manufacturing equipment within the complex from aerial views.[392] When Dow refused the Environmental Protection Agency's (EPA) request for permission to inspect the facility, EPA hired a commercial aerial photographer to take pictures of the complex using a standard floor-mounted, precision aerial mapping camera from altitudes of 12,000, 3,000, and 1,200 feet (all of which were regarded as navigable airspace).[393]

In *Dow Chemical*, the Court concluded that the aerial photography did not involve a search within the meaning of the Fourth Amendment, in part, because the EPA was using commonly available technology.[394] Even though Dow Chemical might have objected under state law had a competitor tried to use aerial photography technology to spy on its industrial processes, the Court emphasized that the EPA was not a competitor.[395] Moreover, since the exterior of the plant could be viewed from a plane, or from a nearby hillside overlooking the facility,[396] the Court concluded that Dow Chemical had no Fourth Amendment claim regarding the exterior of its plant.[397] The Court rejected Dow's argument that the government had photographed curtilage, rather than "open fields,"[398] and upheld the inspection and photography because it did not involve a physical intrusion into plant buildings.[399]

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[389] 476 U.S. 227 (1986).

[390] *Id.* at 229.

[391] *Id.*

[392] *Id.*

[393] *Id.*

[394] *Id.* at 231.

[395] *Id.* at 231-32.

Once again, there was a split within the Court about how to define the REOP test, and once again some Justices argued for a more expansive interpretation of that test. This time the opposition was provided by Justice Powell, joined by Justices Brennan, Marshall, and Blackmun, who concurred in part and dissented in part.[400] Justice Powell noted that the Court's approach to determining whether a REOP exists "will permit the gradual decay" of such rights "as technology advances."[401] In his view, Dow had a REOP regarding the exterior of the facility because Dow had implemented elaborate security measures at the facility,[402] at a cost of more than $3.25 million,[403] and had taken steps to stop or control aerial photography by competitors.[404] In addition, he argued that the camera used by the EPA involved extremely sophisticated technology, which allowed photos to be enlarged "to a scale of 1 inch equals 20 feet *or greater*, without significant loss of detail or resolution," and allowed (with magnification) observation of pipes, etc., that were "as small as ½ inch in diameter."[405] Indeed, the camera used by the EPA's photographer cost more than $22,000.[406]

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[396] *Id.* at 234.

[397] *Id.* at 239.

[398] *Id.* at 235 ("The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.").

[399] *Id.* at 237-38 ("Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because '[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.'").

[400] *Id.* at 240.

[401] *Id.* (Powell, J., dissenting in part).

[402] *Id.* at 241.

[403] *Id.* at 241 n.2.

[404] *Id.* at 241-42.

[405] *Id.* at 243.

[406] *Id.* at 243 n.4.

Since the camera penetrated into a private enclave, and captured far more than the naked eye could see, Justice Powell concluded that Dow had a REOP because the "photographs captured highly confidential information that Dow had taken reasonable and objective steps to preserve as private."[407]

The actual holding in *Dow Chemical* was not reassuring regarding the meaning of the REOP test, or regarding that test's application to advancing technology. The Court held that the police could augment their fly-overs (as in *Ciraolo* and *Riley*) with camera technology (and, presumably, could have augmented it with high-powered binoculars). If the decision is extended to other contexts, the police (or other governmental officials) might have the capacity to peer down into houses and otherwise private spaces. However, in dicta, the Court did offer some encouragement for future uses of sophisticated technology by suggesting that it would have viewed the use of aerial photography much more negatively if the EPA had used "some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories," rather than using what the Court referred to as "a conventional, albeit precise, commercial camera commonly used in mapmaking."[408] In addition, the Court suggested that it might have had greater reservations had the government tried to use "highly sophisticated surveillance equipment not generally available to the public, such as satellite technology," but the Court emphasized that the technology that was actually used was "not so revealing of intimate details as to raise constitutional concerns" even though the EPA obtained more information than could have been obtained simply by technology, which undoubtedly gave the EPA more information than its employees could have obtained with their naked-eye.[409] The Court did express reservations about allowing the government to use sophisticated electronic devices that would allow them "to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets," and suggested that the use of such technologies "would raise very different and far more serious questions."[410] This dicta suggests that the Court might respond more negatively if the government attempted to use sophisticated spy satellites, or fly-overs coupled with high-powered binoculars or observation equipment to peer into people's homes.

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[407] *Id.* at 252.

[408] *Id.* at 238 (majority opinion).

[409] *Id.*

Radio Transmitters and Other Electronic Listening Devices. Of course, the *Katz* case itself involved an electronic listening device, and the Court found a REOP in that case. However, in other cases, the Court has generally refused to find a REOP when the police have used electronic devices to monitor conversations. Illustrative is the plurality opinion in *United States v. White*,[411] a case in which a government informant engaged White in conversation in the informant's home. Police agents were able to overhear the conversation because the informant used a radio transmitter and the police were nearby with radio receivers.[412] The Court noted that, under its prior holdings in *Olmstead*[413] and *Goldman*,[414] there would have been no search because there had been no "actual physical invasion of his house or curtilage" surrounding it.[415] Under the REOP test, the Court found no violation of White's REOP since the informant could have written down what White said to him,[416] and the Court held that it made no difference that the informant was carrying electronic equipment that allowed the content of the conversation to be electronically transmitted to the police.[417]

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[410] *Id.* at 239.

[411] 401 U.S. 745 (1971).

[412] *Id.* at 746-47.

[413] Olmstead v. United States, 227 U.S. 438 (1928).

[414] Goldman v. United States, 316 U.S. 129 (1942).

[415] *White*, 401 U.S. at 748.

[416] *Id.* at 751.

[417] *Id.*

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

Id.

Although a determination of White's REOP would not include the individual's expectations (and the fact that he would not have spoken to the informant if he realized that the informant was working with the police), but instead rely on societal expectations of reasonableness.[418] Consideration of these societal expectations would involve analysis of the fact that an informant could frustrate an accomplice's expectations of privacy by cooperating with the police, thereby rendering the individual's expectations unreasonable.[419] The Court concluded that it mattered not whether the informant spoke directly to the police, or whether he recorded or transmitted the conversations to the police.[420]

Again, there was disagreement within the Court about the meaning of the REOP test, and disagreement about how it should apply to technology. This time, the argument was made by Justice Douglas, dissenting, who argued that electronic surveillance "is the greatest leveler of human privacy ever known."[421] He went on to note:

> But every person is the victim, for the technology we exalt today is everyman's master. Any doubters should read Arthur R. Miller's The Assault on Privacy (1971). After describing the monitoring of conversations and their storage in data banks, Professor Miller goes on to describe "human monitoring" which he calls the "ultimate step in mechanical snooping"—a device for spotting unorthodox or aberrational behavior across

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[418] *Id.* at 751-52.

> Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now before us. Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally "justifiable"—what expectations the Fourth Amendment will protect in the absence of a warrant.

Id.

[419] *Id.*

[420] *Id.*

[421] *Id.* at 756.

> a wide spectrum. "Given the advancing state of both the remote sensing art and the capacity of computers to handle an uninterrupted and synoptic data flow, there seem to be no physical barriers left to shield us from intrusion."[422]

In his view, electronic "aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society," because they make "police omniscient; and police omniscience is one of the most effective tools of tyranny."[423] He then raised the specter of whether technological advancements would force everyone to "live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world?"[424] He concluded with the observation that "I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here."[425]

Electronic Beepers. The Court has also rendered several decisions in cases involving the use of electronic beepers to track a suspect's movement, and once again the Court's application of the REOP test revealed mixed results for the protection of privacy interests. Electronic beepers have significant potential to invade individual privacy by allowing police to track the movements and actions of individuals, and the question is whether police monitoring of beepers constitutes a "search" within the meaning of the Fourth Amendment. The answer to that question has important consequences. If the use of a beeper does not involve a search, then the police might use beepers or other GPS systems to track the movements of various individuals in society. There have also been questions regarding whether the police can surreptitiously install GPS devices or beepers on vehicles and then monitor the movements of those vehicles.

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[422] *Id.* at 757.

[423] *Id.* at 759-60 (quoting Lopez v. United States, 373 U.S. 427, 465-66 (1963) (Brennan J., dissenting)).

[424] *Id.* at 764.

[425] *Id.* at 764-65.

The Court's initial decision, in *United States v. Knotts*,[426] held that police may monitor a beeper (placed in a bottle of chloroform) in an effort to determine where Knotts was traveling, without committing a search.[427] Knotts argued that police use of the beeper constituted a "search" because the police had obtained information from the beeper—in particular, the location of a remote cabin where Knotts was manufacturing drugs—that they could not have easily obtained otherwise.[428] The Court disagreed, noting that an individual has a lesser expectation of privacy in an automobile,[429] that Knotts was traveling on a public highway, and that the beeper simply allowed the government to monitor things that the police could have observed from the highway with their own eyes.[430] In other words, had the police been on the street, they could have seen Knotts driving from the city to his remote cabin. Although the Court concluded that Knotts had an expectation of privacy in the interior of his cabin (which was not infringed),[431] he could not claim a REOP for his drive to the cabin.[432]

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[426] 460 U.S. 276 (1983).

[427] *Id.* at 277, 285.

[428] *Id.* at 284.

[429] *Id.* at 281.

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.

Id. (citing Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality)).

[430] *Id.* at 281-82.

> A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Id.

[431] *Id.* at 285.

> A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin

While the Court's reasoning was technically correct, in that the police could have observed Knotts as he traveled on public streets to get to his cabin, the Court completely ignored the realities of the situation. Knotts, aware that he was manufacturing illegal drugs at the remote cabin, and also aware that he was purchasing chemicals to use in that operation, might have had a heightened sense of awareness regarding the possibility that he was being watched or surveilled during his drive from the store to the cabin. In other words, had the police tried to tail Knotts after he made the purchase, and had he figured out that he was being tailed, he would not have gone to the cabin. Likewise, although the police could have posted monitors along the route to the cabin, they could only have done so if they had been able to obtain good information regarding the location of the cabin, and the route that Knotts might take. Otherwise, it is doubtful that the spotters could have helped the police actually ascertain the cabin's whereabouts. In other words, despite the Court's assertions, the beeper provided the police with the only viable means to monitor Knott's route and destination, but the Court concluded that use of the beeper did not constitute a search, and therefore that the Fourth Amendment was inapplicable.

In *Knotts*, there were the usual disagreements within the Court about the meaning and application of the REOP test and its application to technology. This time Justice Stevens, joined by Justices Brennan and Marshall, concurring, raised concerns about advances in technology, the implications of those advances for individual privacy, and the ongoing validity of the

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> owned by respondent, with the drum of chloroform still in the car. This fact, along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin.

Id.

[432] *Id.* at 282 ("But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields.'").

Katz decision.[433] In *Knotts,* the Court suggested that the Fourth Amendment does not prohibit the police from augmenting their sensory facilities with technology. However, Stevens noted that the *Katz* decision suggested that the use of electronic surveillance techniques might "implicate especially sensitive concerns."[434]

Although the *Knotts* Court sustained the police in the use of a technological device, the Court offered some small comforts regarding the possible encroachments of advancing technology and the possibility that governmental use of sophisticated technologies might eventually become so pervasive that the government could maintain twenty-four-hour-a-day surveillance of both people and public places.[435] In that case, Knotts argued that, if the police could monitor the beeper without implicating the Fourth Amendment, then "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision."[436] In rejecting this concern, the Court concluded that "if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."[437]

Knotts was followed by the holding in *United States v. Karo*,[438] another case that involved police use of an electronic beeper, but there was a critical difference between *Knotts* and *Karo.* In *Karo*, although the police again monitored the beeper to learn the whereabouts of a remote cabin, they continued to monitor the beeper even after it arrived at the cabin.[439] As a result, they were able to ascertain how long Karo kept it there, when he moved it, and where he took it.[440] In line with the Knott's decision, the Court held that installation of the beeper into the chemical product did not invade Karo's Fourth

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[433] *Id.* at 285-86.

[434] *Id.* at 287 (Stevens, J., concurring).

[435] *Id.* at 283.

[436] *Id.*

[437] *Id.* at 284.

[438] 468 U.S. 705 (1984).

[439] *Id.* at 708.

[440] *Id.*

Amendment rights,[441] and that police monitoring of the beeper did not involve a search within the meaning of the Fourth Amendment.[442] Nevertheless, the Court concluded that the police had violated Karo's REOP by continuing to monitor the beeper once it entered the house. By doing so, they learned information about the interior of the house (specifically, how long the beeper remained there), and therefore there was a search within the meaning of the Fourth Amendment.[443] In a theme that has emerged in more recent decisions, the Court focused on the fact that police had intruded on the privacy of Karo's home, emphasized the importance attributed to homes under the Fourth Amendment,[444] and found it offensive that the government had used the beeper to obtain information regarding the interior of the home.[445] As a result, the police used the bee-

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[441] *Id.* at 711.

> It is clear that the actual placement of the beeper into the can violated no one's Fourth Amendment rights. The can into which the beeper was placed belonged at the time to the DEA, and by no stretch of the imagination could it be said that respondents then had any legitimate expectation of privacy in it. The ether and the original 10 cans, on the other hand, belonged to, and were in the possession of, Muehlenweg [the individual from whom Karo purchased them], who had given his consent to any invasion of those items that occurred. Thus, even if there had been no substitution of cans and the agents had placed the beeper into one of the original 10 cans, Muehlenweg's consent was sufficient to validate the placement of the beeper in the can.

Id.

[442] *Id.* at 713.

[443] *Id.* at 715-17.

[444] *Id.* at 714-15.

> At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances.

Id.

[445] *Id.* at 715.

> In this case, had a DEA agent thought it useful to enter the Taos residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without

per to learn more than they could have learned simply from observing from public streets, and the Court held that the police had committed a search within the meaning of the Fourth Amendment.[446]

Again, there was a schism within the Court regarding the meaning of the REOP test and how the test should be applied. This time, Justice Stevens made the dissenting argument, joined by Justices Brennan and Marshall. He argued that police use of the beeper constituted both a search and seizure under the Fourth Amendment because attachment of the beeper interfered with the property owner's possessory rights,[447] as well as because it amounted to the government exercising "dominion" and "control" (which he regarded as a "seizure").[448]

> a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house. The beeper tells the agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched. Even if visual surveillance has revealed that the article to which the beeper is attached has entered the house, the later monitoring not only verifies the officers' observations but also establishes that the article remains on the premises. Here, for example, the beeper was monitored for a significant period after the arrival of the ether in Taos and before the application for a warrant to search.

Id.

[446] *Id.* at 715-17.

[447] *Id.* at 729.

> The owner of property, of course, has a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes. When the Government attaches an electronic monitoring device to that property, it infringes that exclusionary right; in a fundamental sense it has converted the property to its own use. Surely such an invasion is an "interference" with possessory rights; the right to exclude, which attached as soon as the can respondents purchased was delivered, had been infringed. That interference is also "meaningful"; the character of the property is profoundly different when infected with an electronic bug than when it is entirely germ free.

Id.

[448] *Id.* at 730.

> By attaching the beeper and using the container to conceal it, the Government in the most fundamental sense was asserting "dominion and control" over the property—the power to use the property for its own purposes. And

Cases like *Knotts* and *Karo* contain hopeful language regarding the REOP test and the implications of advancing technology, but they also raise troubling implications for whether police can use other types of technology in public places. For example, suppose that the government decides to set up cameras in order to monitor what happens in public places. From a law enforcement perspective, these cameras can be highly effective in helping the police catch criminals. For example, England maintains a fairly elaborate camera system that enables it to monitor what happens in public places such as subway stations. When a bomb was set off in the London Underground a few years ago,[449] the police were able to identify and ultimately apprehend the perpetrators by reviewing closed-circuit television tapes from the affected place.[450] Under decisions like *Knotts* and *Karo*, it would seem that the government could justifiably set up similar closed-circuit televisions in the United States, and monitor what happens in all public places all the time, or review the tapes afterward in an effort to uncover evidence of illegal conduct. Perhaps, governments could supplement these closed circuit systems with facial recognition technology so that they could better identify those who enter public places.[451] From a societal perspective, the question is whether society is willing to allow the government to set up such camera networks in all public places, and whether it is willing to allow the police or other governmental officials to continuously

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> "assert[ing] dominion and control" is a "seizure" in the most basic sense of the term.

Id.

[449] *See* Don Van Natta, Jr. and David Johnson, *London Bombs Seen as Crude; Death Toll Rises to 49*, N.Y. TIMES, July 9, 2005, *available at* http://www.nytimes.com/2005/07/09/international/europe/09intel.html?_r=1&scp=1&sq=london%20subway%20bombing&st=cse.

[450] *See* REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, HOUSE OF COMMONS (May 11, 2006); *New July 7 Bomber Image Released*, BBC NEWS, Oct. 2, 2005, http://news.bbc.co.uk/2/hi/uk_news/ 4301512.stm (containing an image of one of the bombers, and a call to the public for help in identifying him).

[451] *See* Kanya A. Bennett, *Can Facial Recognition Technology Be Used to Fight the New War Against Terrorism?: Examining the Constitutionality of Facial Recognition Surveillance Systems*, 3 N.C. J.L. & TECH. 151 (2001).

monitor (or later review the tapes) in order to determine what people are doing in public places.

On the other hand, *Karo*'s holding suggested that the Court attaches a higher value to expectations of privacy in the home, and therefore that the Court is more likely to be protective against police use of technology in that context. In other words, as applied to other types of technology in other contexts, *Karo* suggests that the Court might be more inclined to hold that there is a REOP, and therefore a search, when the police fly over a house and use sophisticated technology in order to peer down into a house. Of course, the difficulty with decisions like *Karo* is that they seem to apply the REOP test expansively only in relation to the home environment.

Forward-Looking Infrared Technology. Another case in which the Court has ruled on police use of sophisticated technologies was in *Kyllo v. United States*.[452] The technology used in *Kyllo* was FLIR (forward looking infrared detector), which allowed the police to determine the amount of heat emanating from a residence.[453] Police used FLIR because they thought that Kyllo might be growing marijuana in the attic of his home with the aid of grow lights, and FLIR allowed police to determine whether there were excessive levels of heat coming from the roof, and thereby to establish probable cause to obtain a warrant to search Kyllo's home.[454]

Kyllo could have been decided in any number of ways. On the one hand, the Court could have relied on *Place*, the canine sniff case, to hold that the police did not violate Kyllo's REOP, and therefore that there was no search within the meaning of the Fourth Amendment. In other words, the Court could have noted that FLIR did not actually enter the house, but instead simply measured heat emanating from the house, and therefore the Court could have held that police use of FLIR was equivalent to a canine sniff. In addition, as the *Kyllo* Court noted, the police could have obtained information about the heat emanating from Kyllo's house without using any technology at all.[455] For example, following a snow storm or rain storm, the police could have observed the house from the street to determine whether the snow or precipitation dried more quickly from Kyllo's house than from surrounding houses, and from that observation the police could have determined that a higher level of heat was emanating from Kyllo's house, and could perhaps have surmised that Kyllo was using grow lights to cultivate marijuana in the attic.[456] As a result, the Court could have had held that it made no difference whether the police used FLIR or whether they simply waited until it rained or snowed. Either way, the police obtained the same information.

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[452] 533 U.S. 27 (2001).

[453] *Id.* at 29-30.

[454] *Id.*

The Court chose not to invoke *Place's* analysis, instead finding a violation of Kyllo's REOP, and therefore concluding that police use of the FLIR constituted a search within the meaning of the Fourth Amendment.[457] In reaching that conclusion, the Court focused on the fact that the police were using FLIR to obtain information about Kyllo's home, including the interior of the home,[458] and the Court emphasized the sanctity of the home under the Fourth Amendment.[459] While the Court recognized that the police could have maintained visual surveillance of a home,[460] the Court expressed doubt about the permissibility of allowing the police to use technology to gain information about what was happening inside of a house.[461] As a result, even though the technology used by the police in *Kyllo* was relatively crude (off-the-wall technology that allowed police to determine no more than the amount of heat emanating from the house), and provided only limited information about what was happening inside the house, the Court found a search had occurred because the technology was being used to snoop at a person's home,[462] a situation in which an individuals' REOP is particularly strong.[463] Moreover, the Court expressed concern that FLIR technology might be used to obtain "intimate details" about what was happening inside the house (e.g., the hour at which the lady of the house took her bath).[464] Even the relatively limited information obtained from the FLIR constituted a search within the meaning of the Fourth Amendment because the technology was focused on the home.[465] *Kyllo* concluded that the minimal nature of the intrusion should not defeat Kyllo's REOP since, in the home, "all details are intimate details" so that "a firm" and "bright" line must be drawn at "the entrance to the house," and a warrant is required.[466]

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[455] *Id.* at 36 n.2.

[456] *Id.*

[457] *Id.*

[458] *Id.* at 40.

[459] *Id.* at 31 ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'").

[460] *Id.* at 32.

> We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property . . . but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in California v. Ciraolo, 476 U.S. 207, 213 (1986), "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." . . . [We] have held that visual observation is no "search" at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional.

Id.

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[461] *Id.* at 33.

> The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical*, we noted that we found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened."

Id.

[462] *Id.* at 35-37.

[463] *Id.* at 34-35.

> While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," Silverman v. United States, 365 U.S. 505, 512 (1961), constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

Id.

[464] *Id.* at 38.

Kyllo, of course, like *Karo* and *Katz* itself, was one of the few cases where the Court applied the REOP test more expansively as applied to technology. However, some Justices were unhappy with that expansion. Justice Stevens, joined by the Chief Justice O'Connor and Justice Kennedy, dissented. He distinguished between "through-the-wall surveillance" (which he defined as "observer or listener direct access to information in a private area"), and "off-the-wall" surveillance (which he defined as "the thought processes used to draw inferences from information in the public domain").[467] While Stevens viewed the Court's treating FLIR as being through-the-wall technology, he argued that the case actually involved only "off-the-wall" surveillance of the exterior of the home, and therefore he believed that police use of FLIR "did not invade any constitutionally protected interest in privacy."[468] He noted that what "the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others."[469] As a result, he concluded that the police did not "obtain information that it could not have obtained by observation from outside the curtilage of the house."[470]

While Stevens recognized that the Court might have been concerned about future advances in technology, he concluded that the "countervailing privacy interest [in *Kyllo*] is at best trivial."[471] He noted that "homes generally are insulated to keep heat in, rather than to prevent the detection of heat going out," and he doubted that "society will suffer from a rule requiring the rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat, and wishes to conceal that production from outsiders, to make sure that the surrounding area is well insulated."[472] He also concluded that:

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[465] *Id.* at 37 ("In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.").

[466] *Id.* at 37, 40.

[467] *Id.* at 41 (Stevens, J., dissenting).

[468] *Id.*

[469] *Id.* at 42-43.

[470] *Id.* at 43.

> [t]he interest in concealing the heat escaping from one's house pales in significance to "the chief evil against which the wording of the Fourth Amendment is directed," the "physical entry of the home" and it is hard to believe that it is an interest the Framers sought to protect in our Constitution.[473]

Although *Kyllo* is one of the few United States Supreme Court decisions to construe *Katz* expansively (in addition to decisions like *Katz* itself and *Karo*), the decision contained an ominous warning regarding the advance of technology. The decision did not go so far as to hold that the police were absolutely precluded from using advancing technology to pry into people's homes. On the contrary, the Court stated that the government was precluded from gaining information regarding the interior of the home using sense enhancing technology when "the technology in question is not in general public use."[474] This limitation might not raise particular concerns regarding the use of thermal imaging technology. Only particularly nosy neighbors might be interested in whether high levels of heat emanate from a neighbor's home, and therefore limited numbers of people might be inclined to purchase such technology. However, neighbors might be inclined to purchase and use other technological devices (e.g., sophisticated listening devices) that would allow them to ascertain what their neighbors are saying or doing inside their homes. Moreover, such devices are becoming increasingly cheaper and easier to obtain. The same can be said for spyware that might be used by police to track an individual's movements on the Internet from a remote location, or even to invade someone else's computer. As a result, *Kyllo* may have opened up a gaping hole in the Fourth Amendment. If an individual does not have a REOP in an activity, then there is no "search" when the police surveil it. If a REOP disappears as to technology that is in common use, then the advance of technology could eventually obliterate Fourth Amendment protections.

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[471] *Id.* at 45.

[472] *Id.*

[473] *Id.* at 46 (internal citations omitted) (quoting United States v. U.S. Dist. Ct. for E. Dist. of Mich., 407 U.S. 297, 313 (1972)).

[474] *Id.* at 34.

Of course, as technology becomes more common, and neighbors are able to pry into each other's lives, the Court might decide to construe *Katz* and *Kyllo* as providing protection against even technology that is readily available to the general public. Or, alternatively, the Court might choose not to do so. The Court might, for example, hold that an individual cannot have a reasonable expectation of privacy (vis-a-vis the police or other neighbors) regarding technology that is readily available to the public and in general use. If the Court moves in that direction, the *Katz* test will be an instrument for undermining rather than protecting Fourth Amendment rights. Of course, if technology becomes so widely available, the Court may reverse course or may choose not to adhere to the *Kyllo* dicta. In addition, Congress or state legislatures may decide to step in and provide protection against such snooping. Just as legislatures have adopted restrictions against wiretapping and against computer hacking, they could choose to regulate sophisticated listening devices (or other such invasive technology). Nevertheless, the *Kyllo* dicta is disconcerting.

Text Messaging. The final technology case deals with whether an individual has a REOP in text messages. That issue arose in *City of Ontario v. Quon*,[475] the Court's most recent pronouncement on the REOP test and its application to technology. That case was complicated by the fact that the pager (on which the text messages were sent) had been issued to Quon by his employer (a public entity), as well as by the fact that there was a governmental policy which provided that the employer could audit the text messages.[476] The text messages were not stored on city-owned computers, but instead were sent through a wireless provider who stored the messages on its computer network.[477] Quon's usage was investigated because he exceeded his character allotment, thereby subjecting the city to additional charges for his pager, and the city sought to determine whether the messages involved personal text messages or business text messages.[478] After the city investigated Quon's account with the wireless provider, it commenced disciplinary proceedings when it found that Quon had sent a number of non-work related texts that were sexually related.[479]

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[475] 130 S. Ct. 2619 (2010).

The Court did not resolve the question of whether Quon had a REOP in text messages sent via his work pager, but simply assumed that he did.[480] However, the Court was well aware of the problem of advancing technology, but it expressed great uncertainty regarding how the REOP test should be applied to technologies, and it also expressed a reluctance to develop far reaching rules governing technology.[481] The Court was well aware of the fact that communications technologies are changing quickly, as are societal expectations regarding behavior in regard to those technologies,[482] and the Court was wary about how societal norms would eventually evolve in relation to such technologies.[483] Moreover, the Court acknowledged that cell "phone and text message communications" have become "so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy."[484] However, given that cell phones and pagers are now relatively cheap, the Court suggested that employer policies regarding the use of such devices might impact an employee's privacy expectations.[485] As a result, the Court simply assumed that Quon had a REOP in the pager.[486] Regardless, the Court concluded that he could not assume that his messages were immune from employer scrutiny, especially given that he was told that his messages were subject to audit, and that the nature of his job suggested that his actions might come under scrutiny given that he was charged with responding to SWAT team emergencies.[487]

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[476] *Id.* at 2625.

[477] *Id.*

[478] *Id.* at 2625-26.

[479] *Id.* at 2626.

[480] *Id.* at 2630.

[481] *Id.* at 2629-30.

[482] *Id.* at 2629. ("Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior.").

[483] *Id.* at 2630.

[484] *Id.*

CONCLUSION

In the decades leading up to the *Katz* decision, the Court struggled to deal with the implications of advancing technology using the Court's traditional definitions of the term "search" (defined to include a search of a person or of a "constitutionally protected area"). These struggles were reflected in decisions like *Olmstead*,[488] *Goldman*[489] and *Silverman*,[490] which revealed deep divisions within the Court about how new forms of technology should be dealt with under the Fourth Amendment. In those cases, it became clear that the idea of an "intrusion into a constitutionally protected area" could not deal with some of the new devices that had been developed (e.g., the detectaphone), and some Justices were concerned about the possible development of new and even more sophisticated forms of surveillance technology.[491]

When *Katz* was decided, it might have been regarded as a hopeful decision because it redefined the concept of a search for

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[485] *Id.* ("On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.").

[486] *Id.*

[487] *Id.* at 2630-32.

[488] Olmstead v. United States, 277 U.S. 438 (1928).

[489] Goldman v. United States, 316 U.S. 129 (1942).

[490] Silverman v. United States, 365 U.S. 505 (1961).

[491] *Id.* at 512.

Fourth Amendment purposes, and seemed to offer the Court an approach for dealing with new and more sophisticated forms of technology. In *Katz* itself, the Court used the REOP test to find a search under circumstances that would not have constituted a search under the Court's pre-*Katz* precedent. However, in the more than three decades since *Katz* was decided, the REOP test has not always lived up to these hopes. In the Court's non-technology decisions, as well as in its standing decisions, the Court has construed the REOP test rather narrowly. Indeed, in the overwhelming majority of cases where the Court has found a REOP, the Court would have found a search under its pre-*Katz* precedent. In several of the Court's standing decisions, when an individual would have standing to challenge a search under the Court's pre-*Katz* precedent, the Court refused to find a REOP and therefore denied standing.

The Court's post-*Katz* technology decisions are a bit more of a mixed bag. However, in a number of those cases, the Court has restrictively construed the REOP test. As a result, the Court has held that there is no violation of an individual (or company's) REOP when the police conduct surveillance using such devices as flashlights, electronic listening devices (except, of course, in *Katz*), plane flights (with one exception[492]) or electronic beepers.[493] In addition, police have been allowed to combine technologies without violating a REOP. For example, they have been allowed to use both aircraft and photographic equipment together in order to spy down onto property.[494]

Despite the overall trend of the Court's post-*Katz* REOP decisions, there are heartening trends for privacy in some recent decisions. For example, the Court has tended to be protective of the home environment, and to be more likely to invalidate the use of sophisticated technologies to spy on individuals in their homes.[495] This theme emerged in *United States v. Ka-*

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[492] *See* United States v. Karo, 468 U.S. 705 (1984).

[493] *See* United States v. Knotts, 460 U.S. 276 (1983).

[494] *See* Dow Chem. Co. v. United States, 476 U.S. 227 (1986).

[495] *See* Kyllo v United States, 533 U.S. 27 (2001);

> At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not

ro,[496] in which, although the Court recognized that police could use electronic beepers to track the movements of individuals on public streets,[497] and the Court held that there was a violation of a REOP, and therefore a search, when the police used a beeper to obtain information about what was happening in a home (in particular, information about the whereabouts of the beeper and how long it remained in the home).[498] Likewise, in *Kyllo v. United States*,[499] the Court emphasized the importance attached to the home under the Fourth Amendment. Of course, the problem is that, in a modern technological society, the home is only one place where individuals may harbor expectations of privacy, and only one place where individuals will maintain information that they consider private. The Court's post-*Katz* decisions do not suggest a broad application of the REOP test to contexts outside the home (except, of course, for things like automobiles and suitcases—things that were pro-

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> authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances.

Karo, 468 U.S. at 714-15.

[496] *Karo*, 468 U.S. at 705.

[497] *See Knotts*, 460 U.S. 276 (1983).

[498] *Karo*, 468 U.S. at 715.

> In this case, had a DEA agent thought it useful to enter the Taos residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house. The beeper tells the agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched. Even if visual surveillance has revealed that the article to which the beeper is attached has entered the house, the later monitoring not only verifies the officers' observations but also establishes that the article remains on the premises. Here, for example, the beeper was monitored for a significant period after the arrival of the ether in Taos and before the application for a warrant to search.

Id.

[499] 533 U.S. 27 (2001).

tected under the Court's pre-*Katz* jurisprudence), especially against the use of techniques like canine sniffs.

So, where will the Court's REOP jurisprudence go from here? It is difficult to know. In dicta, in various decisions, the Court has suggested that it may be inclined to construe the REOP test more broadly if police or other governmental usage of technology becomes too overbearing or too intrusive on personal privacy. For example, in the *Dow Chemical* case,[500] the Court suggested that it might place greater limits on police use of technology (in that case, aerial photography) if the government uses technology that would allow them to penetrate through walls and intrude upon intimate conversations.[501] In the *Knotts* case,[502] as well, concerns were raised about whether the police could use beepers and other devices to maintain "twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision."[503] Although the Court rejected this concern, it noted that it might respond if such conditions actually developed.[504] On the other hand, in *Kyllo*, the Court suggested in dicta that an individual might not be able to establish a REOP against technology that is "in general public use."[505] As technology becomes ever more readily available, and ever cheaper, this dicta becomes ever more worrisome.

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[500] Dow Chem. Co. v. United States, 476 U.S. 227 (1986).

[501] *Id.* at 238-39. The Court offered the example of a "unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking." *Id.* at 238. It went on to state that:

> By contrast, if the government had used an "electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions; other protections such as trade secret laws are available to protect commercial activities from private surveillance by competitors.

Id. at 239.

[502] *Knotts*, 460 U.S. 276 (1983).

[503] *Id.* at 283.

[504] *Id.* at 284 ("[I]f such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.").

[505] Kyllo v United States, 533 U.S. 27, 34 (2001).

The one thing that remains clear, some three decades after the *Katz* decision was rendered, is that the Court is still struggling to determine what the REOP test means, and there are continuing disputes between the Justices about how to apply the REOP test. Indeed, in the Court's recent decision in *City of Ontario v. Quon*,[506] although the Court seemed to be cognizant of problems presented by advancing technology, the Court expressed uncertainty about its ability to resolve REOP questions as applied to new technologies, and therefore suggested that it was inclined to go slowly in developing new rules.[507] The hopeful part of that decision was that the Court seemed to finally recognize that society is in flux due to the development of new technologies, as well as because of rapidly changing societal expectations regarding behavior in regard to those technologies.[508] However, the Court was reluctant to speculate about how societal norms would eventually evolve in relation to such technologies,[509] especially since some of these devices had evolved into what the Court referred to as "essential means or necessary instruments for self-expression, even self-identification."[510]

Nevertheless, it is a bit surprising that the REOP test remains so ill-defined thirty plus years after *Katz* was decided. Is that because of flaws in the test itself? At least one commentator has suggested that the test should be abandoned in favor of a return to common law approaches to defining the term "search."[511] In a number of post-*Katz* decisions, individual Jus-

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[506] 130 S. Ct. 2619 (2010).

[507] *Id.* at 2629-30.

[508] *Id.* at 2629 ("Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior.").

[509] *Id.* at 2630.

[510] *Id.*

[511] *See* Timothy Casey, *Electronic Surveillance and the Right to Be Secure*, 41 U.C. DAVIS L. REV. 977 (2008).

> Recent cases demonstrate that our Fourth Amendment jurisprudence is on the verge of collapse and will only survive if courts reclaim the original meaning and language of the Constitution. The next paradigm shift must include a departure from *Katz*'s use of privacy language, and focus instead on the right of the People to be secure. Fundamental to the modern conception of personal

tices have argued that the REOP test needs to be redefined and recalibrated. For example, in *Smith v. Maryland*,[512] a dissenting Justice Marshall argued that the Court should replace the *Katz* test with a new test that focuses "not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society."[513] In that case, involving police use of a pen register to monitor and record the phone numbers that Smith had dialed, Justice Marshall argued that citizens should not be required to assume the risk that the numbers they dial will be turned over to authorities considering the "intrinsic character" of the investigative practice, the "basic values underlying the Fourth Amendment," and the fact that such intrusions "significantly jeopardize [an individuals'] sense of security."[514] Likewise, in *Florida v. Riley*,[515] a dissenting Justice Brennan argued that the Court should determine whether a REOP exists by asking "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."[516] Both of these tests suffer from all of the problems inherent in the REOP test because they use case-by-case approaches, and are vague, and therefore the meaning of the test can vary depend-

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> security, and indeed one of the basic precepts of the Founding Fathers, is the idea that the government does not ensure the security of the People, but rather that the government embodies the interest against which the People must be protected. Reclaiming the original language of the Constitution by substituting a right to personal security for a reasonable expectation of privacy will simultaneously dispel the false notion that the Fourth Amendment protects individual interests in opposition to collective interests, and reaffirm the idea that only by protecting individual security will we increase our collective personal and national security.

Id.

[512] 442 U.S. 735 (1979).

[513] *Id.* at 750.

[514] *Id.* at 750-52.

[515] 488 U.S. 445 (1989).

[516] *Id.* at 456 (Brennan, J., dissenting) (citing and quoting Amsterdam, *supra* note 20, at 403).

ing on who is applying the test. However, both tests offer marginal improvements in that they set "mood points" for judicial analysis that are potentially more protective of privacy interests. Professor Anthony Amsterdam offered a similar sort of test when he argued that *Katz's* REOP test should not ask us what we "expect" of government, but rather "what we should demand of government."[517] By contrast, Professor Thomas Clancy has suggested that the Court should focus on the right to exclude the government.[518]

Some privacy protections may come from the legislative arena in that Congress or state legislatures may pass legislation prohibiting certain types of practices or conduct, and we may be able to claim a REOP based on that legislation. For example, although it is relatively easy to wiretap a phone, we have laws making it illegal to do so. However, today, more than three decades after *Katz* was decided, it is not clear that the Court's REOP test is providing those protections, or that the test is capable of doing so.

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[517] Amsterdam, *supra* note 20, at 384.

[518] Thomas Clancy, *Coping with Technological Change:* Kyllo *and the Proper Analytical Structure to Measure the Scope of Fourth Amendment Rights*, 72 MISS. L.J. 525 (2002).